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REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING

DECEMBER TERM, 1879,

BY

JNO. W. SHEPHERD,

STATE REPORTER.

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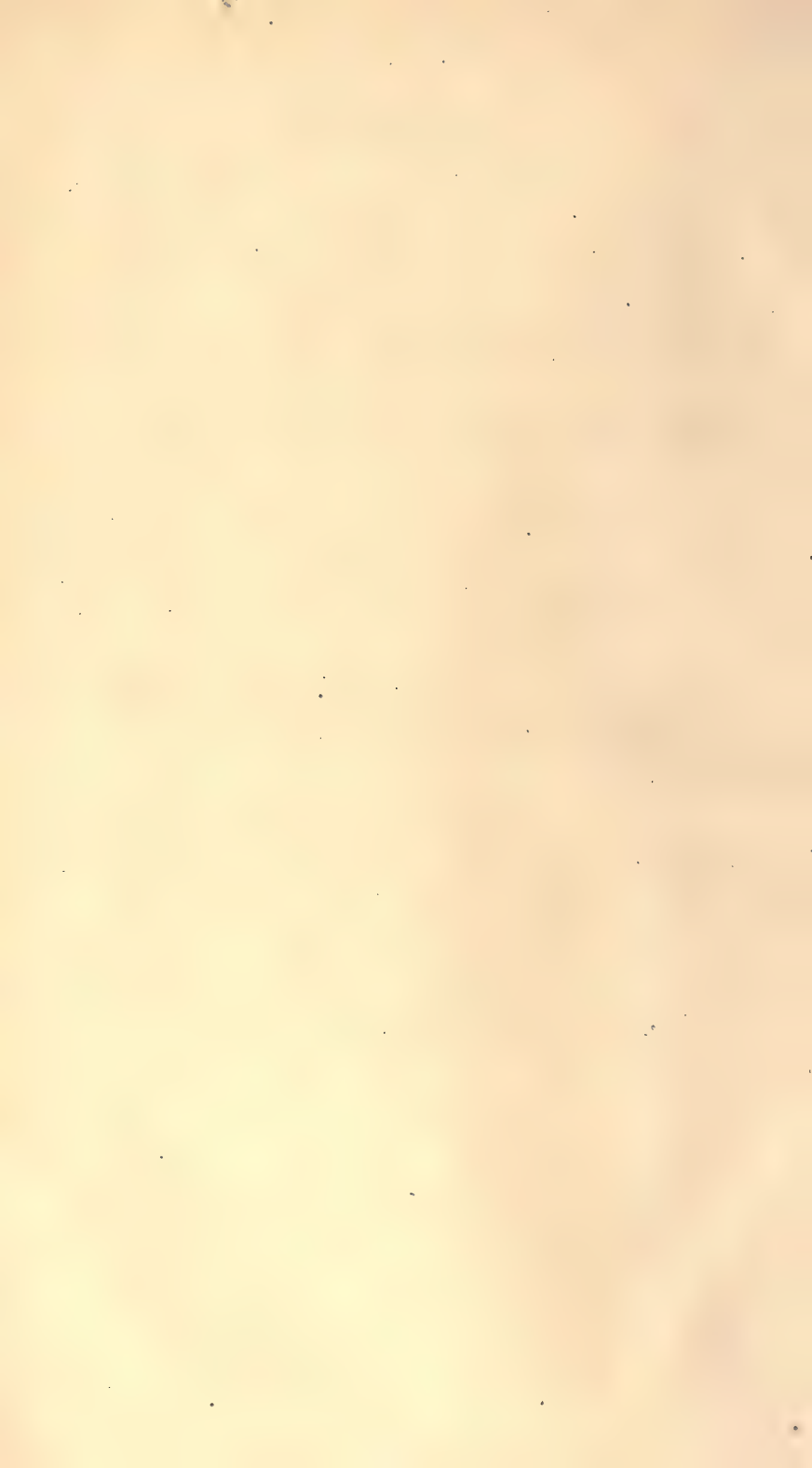
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CASES
IN THE
SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1879.

Murphy v. The State.

Indictment for Burglary.

1. *Admissibility of confessions.*—Although the more recent authorities favor the admissibility of confessions, unless they are shown to have been made under the influence of promises or threats on the part of an officer of the law; yet this court, constrained by its former decisions, holds a confession inadmissible, when induced by hope or fear excited in the mind of the accused, by the representations of any person connected with the prosecution, or with the accused himself, who, considering his relations and condition, may fairly suppose that such person has power to secure the performance of his promises or threats; and excludes the confessions of the accused in this case, made while he was in jail under a charge of burglary, to a clerk in the storehouse alleged to have been broken and entered, who was also a part owner of the goods said to have been stolen from it, and induced by his promises not to prosecute the accused, and not to appear as a witness against him unless compelled.

2. *Same; when corroborated.*—When the confession of the accused is corroborated by extraneous facts—as, in this case, by the discovery of a part of the stolen goods, in consequence of a statement made by him, in the possession of a particular person recently after the burglary—it is competent to prove to the jury his statement and the corroborating fact of the discovery; but this does not render competent his confession, at the same time, that he committed the burglary and larceny, if such confession was improperly procured by promises or threats.

FROM the Circuit Court of Dallas.

Tried before the Hon. GEO. H. CRAIG.

The indictment in this case, which was found at the November term of said court, 1879, charged that the defendant, "Daniel Murphy, *alias* Dan Murphy, broke into and entered the store-house of David Weaver and Nathan Daniel, a building in which goods and merchandise, things of value, were at the time kept for use, sale, or deposit, with intent to steal." The defendant pleaded not guilty, was tried on issue joined on that plea, convicted, and sentenced to the penitentiary for the term of six years. On his trial he reserved the following bill of exceptions:

[Murphy v. The State.]

"D. Savery, a witness for the State, testified that, during the month of July, 1879, he was in the employment of Nathan Daniel and David Weaver, as a clerk in their store, which was in Perry county, but not more than one hundred yards from the Dallas county line; that during said month of July, while so employed, he one day left said store-house, first closing and locking all entrances to it, and leaving no place open through or by which a person could enter without breaking, unless through the chimney; that he left in the said house a stock of goods, his cuff-buttons, a finger ring, and fifty cents in money, which were all things of value, and the goods were kept for sale; that when he returned to the said store, he discovered that the buttons, ring and money had been taken out, the cash-drawer had been carried out and left in the yard, and some small articles of merchandise had also been taken out; that the store had not been broken in any part, so far as he could see, but was in the condition in which he left it, with the exception of the property taken out; and that the soot in the chimney had been raked down, and was on the floor, as if some person had entered through the chimney. A short time after this, the witness said, he visited the defendant, who was, at the time of his visit, confined in the jail of Dallas county, and told him, that if he would tell him (witness) whether he was the person who entered the store, and where the jewelry was, he would not prosecute him, and would not swear against him unless forced to do so. The solicitor then asked the witness to state what the defendant told him on that occasion; to which the defendant objected, because the confession was not voluntary. The court then directed and permitted the solicitor to ask the witness, whether, in consequence of information then derived from the defendant, he found any of the articles taken from the store; to which the witness answered, that he did: that the defendant told him he had loaned the cuff-buttons to George Goldsby, and had sold the ring to a colored man on Mr. Marshall's place, whose name he did not recollect; and that he (witness) got the buttons from said Goldsby, and the ring from a white man named Blunt, who was clerking for Mr. Marshall, but was not the person to whom defendant said he had sold it. The court then permitted the solicitor to ask the witness to state all that the defendant said on that occasion; to which the defendant objected, because the same was not voluntary, and was obtained from him upon the promise that said witness would not prosecute him, and would not swear against him unless forced to do so; but the court overruled the objection, and permitted the witness to state all that the defendant told him;

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to which the defendant excepted. The witness then testified, that on that occasion, and after this promise, the defendant told him that he was the person who entered the said store; to which evidence the defendant objected, because such confession was not voluntary, but was obtained from him on the said promise of the witness; but the court overruled the objection, and admitted the evidence; to which the defendant excepted. This being all the evidence, the defendant moved the court to exclude from the jury the confession that he was the person who entered the store, because the same was not voluntary; but the court overruled said motion, and the defendant excepted. The defendant then asked the court to admit said confession only for the purpose of showing that the property taken from the storehouse, and recovered by the witness, was discovered conformably with the information obtained by the witness from the defendant; because the same was not voluntary, and was obtained upon the said promise of the witness. But the court overruled this motion, also, and allowed the evidence to go to the jury without restriction; to which the defendant excepted."

H. S. D. MALLORY, for the defendant, cited the case of *Brister v. The State*, 26 Ala. 107.

H. C. TOMPKINS, Attorney-General, for the State, cited *Brister v. The State*, 26 Ala. 107; *Sampson v. The State*, 54 Ala. 241; *Hudson v. The State*, 9 Yerger, 408; *The State v. Brick*, 2 Harring. 530.

BRICKELL, C. J.—It may be, if the confession of a prisoner, or a person charged with a criminal offense, is obtained by promises of favor, made by one who is known to him to have no connection with the prosecution, no interest in it, and no power to control it, that it will be received in evidence; and it is, perhaps, true, that the more recent authorities favor the admissibility of confessions, unless it is shown that they were made under inducements held out, or threats made, by a person having authority—*an officer of the law*. 1 Wharton's Cr. Law, §§ 686-92. We feel constrained by our former decisions to hold, that a confession induced by hope or fear, excited in the mind by the representations of any one connected with the prosecution, or connected with the accused, who may, considering his relations and condition, be fairly supposed by him to have power to secure him whatever of benefit is promised, or to influence the threat

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ened injury, cannot be regarded as voluntary, and ought not to be received in evidence.

The confessions in this case were made to a person who was engaged as a clerk in the store-house alleged to have been broken and entered, and the owner of a part of the goods said to have been stolen therefrom. They were made while the prisoner was in jail, and upon promises that he (the clerk) would not prosecute him, and would not appear as a witness unless compelled. It would be a departure from the current of our former decisions, which have not favored the admissibility of confessions, unless plainly shown to be voluntary—uninfluenced by hope or fear—to pronounce these confessions admissible evidence.

2. But it is insisted for the State, and that was the view of the Circuit Court, that the confessions were admissible, because part of the property stolen was found in the hands of persons to whom the prisoner stated he had disposed of it. There is much of obscurity and confusion in the law relating to the admissibility of confessions. The cases are conflicting and irreconcilable, and the statements of principles by the most approved text-writers are not always harmonious and consistent. We do find it stated in judicial decisions, that, although confessions have been obtained under the influence of threats or promises, they are admissible, and will support a conviction, if attended by extraneous facts corroborating their truth; for instance, if, in a case of homicide, the body is found where the prisoner in his confession stated it was; or if, in a case of larceny, the stolen goods are found where he stated they were concealed.—*Aikin v. The State*, 35 Ala. 399; *The State v. Brick*, 2 Harr. 530; *The State v. Crank*, 2 Bailey, 77. The correct principle, however, is as stated by Wharton: "Although confessions, obtained by threats or promises, are not evidence, yet, if they are attended by extraneous facts, which show that they are true, any such facts which may be thus developed, and which go to prove the existence of the crime of which the defendant was suspected, will be received as testimony: *e. g.*, where the party thus confessing points out or tells where the stolen property is; or when he states where the deceased was buried; or gives a clue to other evidence which proves the case."—1 Wharton's Am. Cr. Law, § 695; 1 Phill. Ev. 412; 1 Greenl. Ev. §§ 231-2. It is not the entire confession, however, which may be received: it is only so much of it as relates *strictly* to the material fact discovered, that may be given in evidence; for the fact discovered has a reasonable tendency to confirm that part of the confession, and to exclude the idea of its fabrication under undue influences.

[Lockett v. The State.]

3 Russ. 419; *Warickshall's case*, 1 Leach, 298, case 127; *Death-ridge v. The State*, 1 Sneed, 75.

In the case last cited, the prisoner was indicted for the arson of a store-house; and under threats and promises, he made confessions of complicity in the crime, and pointed out where goods stolen from the house were concealed. The entire confession had been received on his trial, and erroneously, as was decided by the Supreme Court. After stating the principle as it is stated in Russell on Crimes, the court said: "It was competent to prove that the prisoner stated, or pointed out, the place where the goods might be found, and that the goods were found at the place indicated by him. That is all of the confession, in such case, that is competent; and it becomes so only from the fact that its truth is verified by the discovery of the goods. But, if the prisoner had stated, at the same time, that he had taken the goods from the burning house, and put them there, that would be incompetent as evidence; it being part of extorted or improper confession." Applying this rule to the evidence in this cause, it was proper to leave to the consideration of the jury the fact that, in consequence of the statement made by the prisoner, a part of the stolen goods were found in the possession of a particular person, recently after the burglary; but not his acknowledgment that he had broken and entered the store, or that he had stolen the goods. These are facts the jury must collect or not from all the circumstances of the case, and they are not to be aided by confessions extorted from the excited hopes of the prisoner.

The judgment must be reversed, and the cause remanded. The prisoner will remain in custody, until discharged by due course of law.

Lockett v. The State.

Indictment for Arson.

1. *Sufficiency of indictment in description of building burned.*—In an indictment for arson (Code, § 4347), the building burned may properly be described as "the jail of Talladega county, which said jail or building was erected for public use," without further description or averment of ownership.

2. *Accomplice, examined as to matters criminating himself.*—When an accomplice consents to testify as a witness for the State, he can not refuse to answer a question because his answer may criminate himself; but this rule only extends to questions concerning matters about which he has already testified.

3. *Arson; what constitutes.*—If a prisoner, confined in the county jail, set

[Lockett v. The State.]

fire to the building, with the intent only to burn a hole through which he may escape, not intending that the building should be further damaged, he is guilty of arson.

4. *Admissibility of indictments as evidence.*—The indictments pending against the prisoners at the time of their attempt to escape by burning the jail, are admissible evidence against one of them on his trial under indictment for the arson.

5. *Accomplice; how corroborated.*—When a conviction of felony is sought on the testimony of an accomplice, there must be corroborative evidence tending to connect the defendant with the commission of the crime (Code, § 4894); and when there is such corroborative evidence, it is for the jury to decide the effect to which it is entitled.

FROM the Circuit Court of Talladega.

Tried before the Hon. LOUIS WYETH.

The indictment in this case contained two counts; the first charging that John Lockett and Joseph Gantt, *alias* Joe Gantt, "did willfully set fire to, or burn, the jail of Talladega county, which said jail was erected for public use;" and the second, that they "did willfully set fire to, or burn, the jail of Talladega county, of State aforesaid, which said jail or building was erected for public use." No objection was raised to the indictment, so far as the record shows. John Lockett, being on trial alone, pleaded not guilty, and was tried on issue joined on that plea. During his trial he reserved the following bill of exceptions to the several rulings of the court:

"The State introduced Richard Cox as a witness, who testified, that he knew the defendant, and also knew Joe Gantt, and had been in jail with them for several months; that he was in jail sometime in August, 1879, when it was alleged to have been set on fire; that Joe Gantt, John Lockett, Frank Dawson, William Herd, Gus Wynn and himself, said Cox, were all in the same cell; that he saw Joe Gantt kindle the fire, by which the jail was burned; that the fire was kindled by means of matches, which said Gantt had about his person; that John Lockett did not take any part in the burning, except to hand Gantt some splinters near the door of the jail, which Gantt asked him to hand to him, and which Gantt used in kindling the fire. Said witness stated, on cross-examination, that he had been indicted separately for burning the jail, but at a different time, and was imprisoned on a charge of assault and battery with a weapon at the time of the alleged burning with which the defendant is charged; that 'the scheme' of burning the jail, as a means of escape, 'had been talked about among us all,' and the plan was to burn a hole, and escape through the opening thereby made. The defendant's counsel asked the witness, if he did not assist Joe Gantt to kindle the fire by which the jail was burned; but the court thereupon stated to the witness, that

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he was not bound to answer that question, unless he chose to do so; and the witness refused to answer the question. The defendant asked the court to compel the witness to answer the question, and excepted to the refusal of the court to do so. The witness further testified, that he was lying down on the floor of the cell, and saw Joe Gantt kindle the fire.

“Frank Dawson, another witness for the State, testified that he was in the jail at the time it was said to have been burned; that it was set fire to one night in August, 1879; that Joe Gantt was the man who kindled the flame; did not see John Lockett take any part in kindling the fire; heard Gantt ask him to hand him some splinters, but did not know whether he did so or not. Witness stated, on cross-examination, that the scheme of burning the jail, for the purpose of escaping, had been discussed by all the prisoners, himself among the number, for several months before it was done; did not remember whether or not any thing had been said among the prisoners concerning the burning the day before it occurred; was lying on his bed in the cell, and looking at Gantt, at the time the splinters were lit by Gantt as aforesaid.

“Gus Wynn, another witness for the State, testified that he was in the jail at the time it is charged that John Lockett and Joe Gantt set fire to it; saw Gantt strike a match, and kindle the flame; John Lockett handed him some splinters; the burning occurred in August, 1879; the fire had not made much progress when Mr. Edwards came and put it out. Witness stated, on cross-examination: ‘The scheme of burning the jail, and making our escape, had been talked about among the prisoners for some time before it was tried. Joe Gantt, John Lockett, Frank Dawson, Richard Cox, William Herd and myself were all confined in the same cell. Our plan was, to make a hole in the wall by burning, and escape through it. All the prisoners understood the plan, and agreed to it. We were all awake when the flame was being kindled by Gantt.’ Witness stated, that he saw Gantt kindle the fire, and heard him ask some one for some splinters, and thinks it was John Lockett who handed them to him.

“Joseph Edwards, another witness for the State, testified that he was deputy-sheriff, and was in charge of the jail; was aroused one night in August, 1879, by the alarm of fire; went to the cell in which the prisoners were confined, and found that the fire had made some progress in the wall, and had burned a hole about the size of a man’s hat; immediately called in one H. C. Bingham, who lived near by, and, after changing the prisoners to another cell, extinguished

[Lockett v. The State.]

the flames. Witness stated, that Joe Gantt, John Lockett, Gus Wynn, Frank Dawson, Richard Cox and William Herd were all confined together in the cell when the burning occurred, and were all awake when he went in; but he did not know how the fire started, nor who kindled it. The State then offered to read in evidence the indictment under which the defendant had been arrested, and under which he was imprisoned at the time of the burning of the jail; to which the defendant objected, as illegal, incompetent, and irrelevant testimony; but the court overruled the objection, and the defendant excepted. The State then offered and read in evidence a similar indictment against Joe Gantt, under which he was confined in jail at the time of said alleged burning. The defendant objected, and moved to exclude the same from the jury, because it was illegal, irrelevant, and incompetent evidence; but the court overruled the objection and motion, and the defendant excepted.

"This being all the evidence, the defendant requested the court to give the following charges to the jury, which were in writing: 1. 'If the jury believe the evidence, they must find the defendant not guilty.' 2. 'If the jury believe, from the evidence, that all the witnesses examined by the State, as to the defendant's connection with the burning, were accomplices in the commission of the offense, then they must find the defendant not guilty.' 3. 'If the jury believe, from the evidence, that Edwards only proves the fact that there was a fire kindled in the jail, of which the defendant is charged; and that the defendant and the witnesses examined by the State, were in the jail with the defendant; then the evidence of Edwards would not be corroboration sufficient to convict on evidence of accomplices alone.'" The court refused each of these charges, and the defendant excepted to their refusal.

"The court gave the following written charge, at the instance of the State: 'Although the jury may believe, from the evidence, that all the inmates had talked about burning the jail for the purpose of escape; yet, if they are satisfied from the evidence, beyond any reasonable doubt, that one or more of them took no part in the setting fire to it when it was done, but withdrew, and took no part therein, then they would not be accomplices to the burning; and the jury must look to all the evidence, to determine whether Richard Cox and Gus Wynn did take part in said burning, and were, or were not, accomplices.'" To this charge, and to each separate part thereof, the defendant objected and excepted. The court charged the jury, also, *ex mero motu*, as follows: Although all the parties in the jail conspired and agreed to

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burn it, yet, if any one or more of them, before the fire was set to the jail, withdrew from the conspiracy or agreement, such person so withdrawing would not be an accomplice; and if the jury believe, from the evidence of such witnesses (if they find there are such), beyond all reasonable doubt, that the defendant did set fire to and burn, or did aid and assist Joe Gantt in burning the jail, then they must find him guilty.' To this charge also, and to each separate part thereof, the defendant objected and excepted."

BOWDON & KNOX, for the defendant.—1. The indictment is fatally defective, because it contains no averment that the jail was the property of Talladega county.—*Martha v. The State*, 26 Ala. 72.

2. When an accomplice is used as a witness on the part of the State, this necessarily works his acquittal of any complicity in the offense, and in effect is an indemnity against any future prosecution for it. Standing in this position, he can not refuse to answer any relevant question, although the answer may criminate himself. Any other rule might work grievous injustice, and abrogate the statute as to the testimony of accomplices.—Code, §§ 4893, 4895; 1 Bishop's Crim. Law, § 264.

3. Joe Gantt was not on trial, and the indictment against him was clearly irrelevant.

4. The evidence showed that there was no design or intention to burn the jail: the whole plan and purpose was to burn a hole through which to escape, and this does not constitute the offense denounced by the statute.—*People v. Cattaraugus*, 18 Johns. 115; *State v. Mitchell*, 5 Ired. Law, 350. The case of *Luke v. The State*, 49 Ala. 30, is at variance with these authorities; but it is wrong in principle, and ought to be overruled.

5. The rulings of the court as to the testimony of accomplices, both in the charges given, and in the refusal of the charge asked, are in violation of the statute.—Code, § 4895; 1 Bishop's Crim. Law, § 264; *Montgomery v. State*, 40 Ala. 684; *Smith v. State*, 59 Ala. 104. The charges given by the court are also erroneous, because they assume a fact of which there was no evidence—that some of the prisoners withdrew from the plan to burn the jail.

H. C. TOMPKINS, Attorney-General, for the State, cited Code, 995, Form No. 35; *Luke v. The State*, 49 Ala. 50; *State v. Roe*, 12 Vermont, 93; 1 Wharton's Amer. Cr. Law, § 807; 2 *Ib.* § 1663, note 2, and authorities there cited.

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MANNING, J.—We think there was no error in holding that the indictment was not obnoxious to the objection, that the ownership of the building to which fire was set was not sufficiently averred. In the form prescribed by the statute (Code of 1876, p. 995, No. 35), the charge is, that “A. B. willfully set fire to, or burned, in the night time, a *dwelling-house of C. D.*, in which,” &c. This is the manner in which the ownership is alleged. In the indictment before us, the accusation is, that defendant “did willfully set fire to, or burn, the *jail of Talladega county*,” &c. This, if there were no more, would be a sufficient averment of the ownership, according to the statutory precedent, each county in the State being a body corporate.—Code, § 815. But the indictment goes further, and says, “which said jail or building was erected for public use.” The prosecution is under a statute which makes “any person who willfully sets fire to, or burns, any church, meeting-house, college, academy, jail, or other building erected for public use,” guilty of arson in the second degree; and the averment, corresponding with this description of the jail, as the jail of Talladega county, and “a building erected for public use,” clearly shows that the structure burned was the property of another than the defendant.—*The State v. Roe*, 12 Vermont, 93.

2. An accomplice, who consents to testify for the State, that a defendant committed the act for which he is indicted, can not shield himself from answering any relevant question concerning it, under the rule that he shall not be required to criminate himself. The principle of that rule, said the Supreme Court of North Carolina, “does not embrace this case. For the witness is an *accomplice*, who is allowed to give evidence in favor of the State, with the express understanding that he is to *disclose his own guilt*. Consequently, a rule which was adopted in order to prevent a party from being required to criminate himself, and to avoid being criminated by a communication made to his attorney, has no application.”—*State v. Condry*, 5 Jones’ Law, 420. “If a witness consents to testify at all, so as to criminate himself as well as defendant, in the matter on trial, he must answer all questions legally put to him, concerning that matter. He can not be allowed to state such facts only as he pleases to state, and to withhold other facts.” For, thereby, “injustice might be done to the defendant, either by keeping back of testimony which would tend directly to his acquittal, or which would so discredit the witness as to induce the jury wholly to disregard his previous testimony.”—*Commonwealth v. Price*, 10 Gray, 476.

Even in causes between individuals, where there can be no

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understanding, express or implied, that the witness should not be prosecuted for an offense of which his testimony might disclose that he was guilty: if, being aware that he is not obliged to answer a question which may incriminate him, the witness does answer it, "he can not afterwards take the objection to any further question relative to the whole transaction."—*Dixon v. Vale*, 1 Car. & P. 278. And in *East v. Chapman* (2 Car. & P. 570), ABBOTT, C. J., said to a witness in that situation: "You might have objected to giving any evidence; but, having given a long history of what passed, you must go on; otherwise, the jury will only know half of the matter" It can not be tolerated that a person testifying, after stating material facts bearing upon the case, and favorable to one party, shall, when cross-examined in reference to the same subject, decline answering by reason of his privilege not to incriminate himself.—*Foster v. Pierce*, 11 Cushing, 437; *Brown v. Brown*, 5 Mass. 320. His obligation to answer, however, extends only to questions concerning the matter he has testified about, and not to those concerning other matters, though they come within the scope of the cause.—*Chamberlain v. Willson*, 12 Vermont, 491; *The State v. K*—, 4 N. H. 562.

3. The question, whether the burning of a hole, by prisoners, in a jail, for the purpose only of enabling them to escape from it, but with the intent that the building should not be any further damaged, constitutes the crime of arson or not, is a question on which there has been much difference of opinion. Our predecessors, after careful consideration, gave to it an affirmative answer.—*Luke v. State*, 49 Ala. 30. We regard this as the law in this State, and think the court below did not err in holding that such a burning was arson.

4. In the same case it was ruled, that the indictments preferred against prisoners who were in the jail at the time of the endeavor to break out, were admissible evidence for the prosecution. These documents tended to show both the legality of their commitment and detention, and the nature of the offenses, from responsibility for which the defendant, by setting fire to the jail, was aiding them to escape.

5. The statute is express, that "a conviction of felony can not be had on the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense: such corroborative evidence, if it merely shows the commission of the offense, or the circumstances thereof, is not sufficient."—Code of 1876, § 4894 (4193). It is for the jury to decide, when there is in a cause any such corroborative evidence, what effect it is entitled to; and it is unnecessary to anticipate

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what evidence of that kind will be adduced or offered on a future trial of appellant, or what instruction in respect of it shall be given to the jury.

For the error of informing the witness and holding that he was not bound to answer a relevant question, the answer to which might tend to incriminate him, the judgment must be reversed, and the cause be remanded. Let the prisoner remain in custody, till discharged by due course of law.

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Indictment for Grand Larceny.

1. *Proof of value of United States treasury-notes.*—The commercial value of United States treasury-notes, commonly called “greenbacks,” is, as matter of law, what their face imports; consequently, under an indictment for the larceny of such a note, a conviction may be had without any proof of its value except what it purports on its face to be.

2. *Same; charge requiring explanation.*—Hence, also, a charge instructing the jury that, “if the evidence fails to show the value of the property alleged to have been stolen, they must acquit,” although it asserts a correct general proposition, was properly refused in this case, since, without explanation, it would probably have misled the jury, in inducing the belief that extraneous evidence of the value of the stolen note was necessary.

3. *Sufficiency of indictment, in averring facts as unknown to grand jury.*—Under an indictment which charges the larceny of “sundry United States treasury-notes, or national-bank bills, the number and denomination of which are to the grand jury unknown, of the aggregate value of forty dollars,” a conviction can not be had, if the evidence adduced on the trial shows that the number and denomination of the stolen bills were in fact known to the grand jury; but, if they were in fact unknown, though by reasonable diligence and inquiry they might have been ascertained, the averment is sufficient, and a conviction may be had.

FROM the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The indictment in this case contained but a single count, which charged that the defendants, Frank Duvall and Charles Pelham, “feloniously took and carried away sundry United States treasury-notes, or national-bank bills, the number and denomination of which are to the grand jury unknown, of the aggregate value of forty dollars, and the personal property of Isaiah Bozeman.” “The case was tried,” as the bill of exceptions states, “on the plea of not guilty; and Isaiah Bozeman, a colored man, was examined as a witness for the State, and testified as follows: On the — day of November, 1879, during the time of holding the ‘State Fair’ in the city

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of Montgomery, about ten o'clock in the morning, he gave one Dick Adams forty-nine dollars in silver, and one dollar in paper money, and got said Adams to go with him to the bank, and have said money changed into two twenty-dollar bills and one ten-dollar bill. Said money was all that witness had. Adams, having got the money changed, as above stated, gave the bills to witness. Said twenty-dollar bills were 'greenbacks.' Frank Duvall, one of the defendants, who was a colored man, was standing near by, and saw said Adams hand the money to witness. This occurred on Commerce street, in the city of Montgomery, near the Belshaw corner. Witness lived near the corporate limits of the city of Montgomery, in a westerly direction from said corner. Witness had seen said Duvall before, but had no personal acquaintance with him. Witness started to go home, when said Duvall proposed to accompany him a part of the way; and they thereupon went up Montgomery street together, until they reached the foot of the Westcott hill. On the way, Duvall exhibited to witness several cards, which he told witness were 'tricks' that would prevent 'sharp niggers' from getting his money, in the event he should attend the 'Fair' during the week. Witness and Duvall went into a 'cut,' or cross street, for the purpose of examining said cards, when a neatly dressed colored man, whom witness had never seen before, but whom he identified on the trial as Charles Pelham, one of the defendants, came up where they were standing, and inquired the nearest way to Hayneville. Witness replied, 'You are on the right road now;' whereupon said Pelham asked him if he could change a fifty-dollar bill. Witness answered, 'Yes,' and took his money out of his pocket for that purpose, when another colored man, whom witness identified as one William Lawrence (not indicted), suddenly came up on them, and exclaimed, 'I arrest you all for gambling.' Charles Pelham instantly snatched the two twenty-dollar bills from the hand of witness, and fled in one direction, and Duvall in another. Witness and said Lawrence walked together to the top of the hill, and separated. Witness testified that he could not possibly be mistaken as to the personal identity of each of the defendants, or of said Lawrence. Witness further testified, on cross-examination, that he appeared before the grand jury who found the indictment in this case, and testified before them just what he had testified on the trial. Defendants' counsel asked him, if he had testified before the grand jury that he had two twenty-dollar bills, known as 'greenbacks,' and one ten-dollar bill; to which he answered, that he did so state to the grand jury. Thereupon, defendants' counsel sug-

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gested to the court, that there was a variance between the allegations of the indictment and the proof, as to the denomination and description of the property alleged to have been stolen; and moved that the trial be arrested, and that a verdict be entered for each of the defendants on this indictment; which suggestion and motion the court overruled, and each of the defendants duly excepted. Defendants' counsel then asked said witness, if he had not had said Lawrence arrested before the mayor of Montgomery, on a charge of having stolen said money; to which witness answered, that he had. Defendants' counsel then asked him, if he had not testified, on said trial before the mayor, that he could not be mistaken as to the personal identity of said Lawrence, and that he was one of the parties who participated in the larceny of his money; to which he answered, that, according to his best recollection, said Lawrence was not tried before the mayor, but was discharged without a trial, and that he had no recollection of having so testified.

"Polly Thomas, a colored woman, was next examined as a witness for the State, and testified, substantially, that she was at work washing clothes, in a yard, surrounded by a high plank fence, near said 'cut,' or cross street, and saw the defendants engaged in conversation with said Isaiah Bozeman; that she saw only two men besides said Bozeman, who, according to the best of her knowledge and belief, were the defendants, but she did not see either of them run; that one of them, whom she took to be Duvall, walked leisurely down the 'cut,' and the other, whom she took to be said Pelham, accompanied Bozeman to the top of the hill.

"The State having here rested, the defendants then introduced William Lawrence as a witness, who testified that, on the day said larceny was alleged to have been committed, he was working for Col. Holcombe, on his plantation, and had not been in Montgomery county for several days before that day, and was not in the city or county of Montgomery during the week of the 'Fair;' that he knew nothing of the alleged larceny, and had no participation therein; that he was arrested, at the instance of said Bozeman, before the mayor of Montgomery, on a charge of having participated in said alleged larceny, but, on trial before said mayor, was discharged, on proof that he was at work on Col. Holcombe's plantation, in Lowndes county. Defendants' counsel then asked said witness, if said Bozeman did not testify, before said mayor, that he could not be mistaken as to the personal identity of said Lawrence, and that he was one of the persons who participated in said alleged larceny; and the witness answered, that Bozeman swore on said trial that he did

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not think he could be mistaken, that Lawrence was one of the men who participated in said alleged larceny. The defendants introduced several other witnesses, also, whose testimony tended to prove an *alibi* for each of said defendants.

"This was all the evidence, and the court having charged the jury orally, the defendants asked the following charges, which were in writing :

"1. There can be no larceny of anything without value ; and if the evidence in this case fails to show the value of the property alleged to have been stolen, the jury must acquit the defendants.

"2. Evidence that the property alleged to have been stolen was two twenty-dollar 'greenbacks,' is not evidence that they were of the value of forty dollars, or of any value.

"3. Evidence that the property alleged to have been stolen was two twenty-dollar bills, and that they were 'greenbacks,' does not show that they were of any value, or worth forty dollars.

"4. Evidence that the property alleged to have been stolen consisted of two twenty-dollar bills, is not evidence that their value was forty dollars, or that they were of any value.

"5. If the jury are satisfied, from the evidence, that a description of the money, the subject of the alleged larceny, was known to the grand jury at the time they found the indictment in this case, or that by reasonable diligence and inquiry they could at such time have ascertained the same, then they must find the defendant not guilty.

"The court refused each of these charges, and the defendants excepted to the refusal of each."

J. GINDRAT WINTER, for the defendants.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—Charges 2, 3, and 4, asked by defendants and refused by the court, all raise the same question. The testimony tended to show that two twenty-dollar bills, treasury-notes of the United States, were stolen from Isaiah Bozeman. There was no independent testimony that these notes had any value. The proposition of these charges is, that evidence that the property stolen consisted of two twenty-dollar bills, known as "greenbacks," does not show they were of any value. The term "greenbacks," as a designation of United States treasury-notes, has grown into such general use, that neither courts nor juries can be supposed to be ignorant of the meaning it conveys. We think the jury were authorized to infer and find from this expression

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that the witness intended to say, and did in effect say, that the property stolen from him was two United States treasury-notes, each of the denomination of twenty dollars. It is matter of law that the commercial value of United States treasury-notes is what their face imports. Hence, there was enough before the jury to authorize them to find the value of the treasury-notes, or "greenbacks," and the City Court did not err in refusing to give these charges. *Sallie v. The State*, 39 Ala. 691; *Corbett v. The State*, 31 Ala. 329; *Grant v. The State*, 55 Ala. 201.

2. Charges to the jury should be given, and must be construed, in reference to the evidence in the cause.—*Hammett v. Brown*, 60 Ala. 499. "Instructions may be correct, when read in the light of the particular facts, which would be erroneous under a different state of facts."—*Ib.*; *Judge v. The State*, 58 Ala. 407; *Thrash v. Bennett*, 57 Ala. 156. As a general rule, charge No. 1, asked in this case, asserts a correct legal proposition. There can be no larceny of anything without value. But, when viewed in connection with the evidence in this cause, we think the charge, if given as asked, would probably have misled the jury. We have shown the description of the property alleged to have been stolen, as "two twenty-dollar bills, known as greenbacks," furnished evidence from which the jury might find the value. This evidence was before the jury. If the court had instructed them, in the language of the request, that "if the evidence in this case fails to show the value of the property alleged to have been stolen, the jury must acquit," we think they would have understood the court as meaning and intending that there must be other evidence of value, beyond what is implied in the language, "two twenty-dollar bills, known as greenbacks." There was no error in refusing this charge.

3. A graver question arises on the 5th charge asked. The indictment charged, that the defendants "feloniously took and carried away sundry United States treasury-notes, or national-bank bills, the number and denomination of which are to the grand jury unknown, of the aggregate value of forty dollars, the personal property of Isaiah Bozeman." Isaiah Bozeman was examined as a witness; and he testified, that he had in his possession, and in his hand, two twenty-dollar bills, called "greenbacks," and he also had in his possession one ten-dollar bill. He had no other money. He further testified, that Pelham, one of the defendants, snatched the two twenty-dollar bills from his hand, and fled. This witness, on cross-examination, testified that, in his examination before the grand jury, he had stated the same thing he

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here testified—namely, that he had two twenty-dollar bills, known as greenbacks, and one ten-dollar bill. The fifth charge asked and refused is in the following language: “If the jury are satisfied from the evidence that a description of the money, the subject of the alleged larceny, was known to the grand jury at the time they found the indictment in this cause, or that by reasonable diligence and inquiry they could, at such time, have ascertained the same, then they must find the defendants not guilty.” What is the meaning, the proper interpretation, of the words, ‘*number*’ and ‘*denomination*’? If the word had been *numbers*, in the plural, we would be inclined to hold it referred to the serial numbers on the bills. Being in the singular number, it must be construed as expressing or relating to the number of bills alleged to have been stolen; not the numbers on the bills. The word *denomination* explains itself. It refers to the value or number of dollars the several bills represented; as, the denomination of five dollars, the denomination of ten dollars, &c. The grand jury then affirmed, by their indictment, that they did not know the number of bills stolen, nor their denominational value; that is, that the testimony before them did not satisfy their minds on these subjects. We are not informed what other testimony was or was not before that body, bearing on these questions, nor of the degree of intelligence or clearness with which the witness Bozeman gave his testimony. He may have been a very ignorant witness, and the minds of the grand jury may have been left in doubt on these questions; or the testimony of other witnesses may have created doubts. It is within knowledge that the term ‘greenbacks’ is sometimes employed to denote national-bank bills, as well as United States treasury-notes. They are of convertible value, in ordinary commercial transactions, and, unless some special circumstance had fixed attention, the average man would not be able to affirm, with reliable certainty, to which species of circulating medium a bill or bills he had owned, and had passed off, or lost, belonged. So, we repeat, the grand jury, even if Bozeman testified as he said he had done before them, may have had doubts of the number and denomination of the bills.

At the common law, a fact not known to the grand jury, and which could not be learned by the exercise of reasonable diligence, might be charged as “to the grand jury unknown,” unless such fact was an ingredient of the offense sought to be prosecuted. This was a rule of necessity, to prevent a failure of justice; and when the necessity did not exist, the rule did not obtain. Hence, when the fact was known to the grand jury, or could have been learned by the

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employment of reasonable diligence, a conviction was not allowed to be had on an indictment so framed. Courts, in such cases, directed an acquittal, on an indictment so framed. 1 Chit. Cr. Law, 212-213; *Regina v. Stroud*, 2 Moody, 270; *Regina v. Campbell*, 3 Carrington & Kir. 82; *Rex v. Walker*, 3 Camp. 264. But the prisoner was not discharged; he was held for a new indictment, to be preferred in proper form, and according to the facts.—1 Chit. Cr. Law, 213. The same doctrine has been frequently asserted on this side of the Atlantic; some of the cases going so far as to hold that, when a particular fact or name is charged to be to the grand jury unknown, this averred want of knowledge, like any other material averment in the indictment, must be proved, or there can be no conviction.—*Blodget v. The State*, 3 Porter, Ind. 403; *Brooster v. The State*, 15 Ind. 190; *Com. v. Hendrie*, 2 Gray, 503; 1 Bish. Cr. Proc. §§ 549, 551, 553.

In *Com. v. Thompson*, 2 Cush. 551, the defendant was indicted for adultery, in two counts. The first count charged that the adultery was committed with Esther Bradford; and the second, "with a woman whose name was not known." On the trial, there was evidence tending to show that the person, with whom the alleged offense was supposed to have been committed, was known, and that her name was Esther Bradford. On this evidence, the jury were instructed that, "if they doubted whether the true name of the woman was Esther Bradford, they might find the defendant guilty on the second count, if the other necessary facts were proved." The jury found the defendant not guilty on the first count, and guilty on the second count. The court, SHAW, C. J., said: "The instruction of the court, to which exception was taken, appears to us to be correct, as we understand the direction. It was intended, we suppose, to say, that if the evidence was insufficient to establish the fact affirmatively, to the satisfaction of their minds, that the woman's name was Esther Bradford, they could not so find that fact; and as there was no other evidence tending to prove what her name was, the jury would be warranted in finding, that if the act was done at all, it was with a woman whose name, not being proved by any legal and sufficient evidence, was not known to them, and was, therefore, unknown." The practice of varying the averments in two or more counts, pursued by the pleader in this case, might, in cases of doubt or unsatisfactory testimony, be followed with profit, in all similar cases. One rule is clearly declared in all the cases: that when a fact or name is known or proved to the grand jury, there is no warrant in the law for averring such fact or name as unknown. Such form of averment may be supposed to give greater latitude

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of proof; but, when it appears on the trial that the fact or name was known, a conviction on such indictment should not be allowed.

In New York and Missouri, the rule seems to be as follows: when the averment in the indictment is that a name or fact is unknown, such indictment will support a conviction, unless it be shown that such name or fact was *known* to the grand jury. It is not enough that the name or fact is proved, and, therefore, made known to the petit jury, or that, by proper diligence, the grand jury could have learned the true name or fact. It is a question of variance between the averments and the proof; and hence the proper inquiry is not whether that important arm of the law's administration employed due diligence. It was part of their sworn duty to "diligently inquire and true presentment make." The law presumes sworn officials do their duty. The inquiry is, did they falsely affirm the name or fact was unknown, when it was known?—*White v. The People*, 32 N. Y. 465; *Noakes v. The People*, 25 N. Y. 380; *Hays v. The State*, 13 Mo. 246. We think this much the better rule, and that it secures to persons charged with violations of the criminal law all that is practicable, in stating the "nature and cause of the accusation."—Declaration of Rights, section 7; Code of 1876, §§ 4786, 4789, 4790; *Morningstar v. The State*, 52 Ala. 405. See, also, *Sparrenberger v. The State*, 53 Ala. 481; *Washington v. The State*, at the present term. Charge number 5 was rightly refused, because it asked too much. It claimed an acquittal, not only if the grand jury knew the description of the money, the subject of the alleged larceny, at the time they found the bill, but also, if "by reasonable diligence and inquiry they could have ascertained the same."

There is no error in the record, and the judgment of the City Court is affirmed.

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Indictment for Trespass after Warning.

1. *Sufficiency of indictment, in description of premises.*—In an indictment for a trespass after warning (Code, § 4419), as in an action of trespass at common law, a particular description of the premises is not required; nor is it necessary to aver, either as matter of description, or as matter of venue, that they are situated in the county in which the prosecution is instituted.

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2. *Warning, or notice, and proof thereof.*—The warning not to enter, like the notice to quit given by a landlord to his tenant, may be either verbal or written; and when in writing, a copy of it may be used as evidence, without notice to produce the original.

3. *Proof of judicial proceedings before justice of the peace.*—The proceedings had before a justice of the peace, in an action of unlawful detainer, or forcible entry and detainer, and the judgment rendered by him, can not be proved otherwise than by the production of his official papers, or an examined and sworn copy thereof, without accounting for the absence of the original, or showing the impossibility of obtaining a copy thereof.

4. *Same; predicate for secondary evidence.*—Proof of the fact that the justice's docket was in the court-house, six or eight months before that building was destroyed by fire, does not justify the inference that it remained there and was destroyed, nor authorize the admission of secondary evidence of its contents, when it is not shown that any inquiry for it has been made of the justice's successor, who would be its legal custodian.

5. *Proof of probate records; predicate for secondary evidence.*—Proof of the destruction of the court-house by fire, with the records and papers therein deposited and required by law to be kept, authorizes the admission of secondary evidence of the contents of such documents, in the absence of proof that they can be found elsewhere.

6. *Trespass after warning; legal advice as defense.*—In a prosecution under this statute, the defendant can not be permitted to prove, for any purpose whatever, that he entered under the advice of counsel.

7. *Same; what constitutes*—The statute was intended to protect the possession of real estate, against the entry of intruders or trespassers; and it can not be made to serve the purposes of an action of trespass or ejectment. If the defendant, when warned by the prosecutor not to enter, was himself in possession of the premises; or if, at the time of his entry after warning, the title and right of entry resided in him; in either case, no conviction can be had against him. But no mere claim of title, however honestly made, can justify or excuse the trespass, if committed after warning.

FROM the Circuit Court of Covington.
Tried before the Hon. JOHN K. HENRY.

J. D. GARDNER, for the appellant.

J. M. WHITEHEAD, with the Attorney-General, for the State.

BRICKELL, C. J.—1. The indictment charges that the defendant, after having been warned in the next preceding six months not to do so, without legal cause, or good excuse, entered into the dwelling-house, or on the premises of Wm. F. Acree, "on to-wit, the place or premises, sometimes known and called as the Little place." The defendant demurred, assigning as causes the insufficiency of the description of the premises, and the absence of an averment that they were situate in the county, in which the indictment was found. The indictment avers no more than a mere private injury at common law, not the subject of a criminal prosecution, capable of redress only by an action of trespass *quare clausum fregit*. The statute converts it into an indictable offense, and entitles the party injured to the fine assessed on

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conviction.—Code of 1876, §§ 4419-20. The common law did not require that, in declaring for a wrongful entry or intrusion upon lands, there should be any other description of the premises, than that they were the close of the plaintiff, nor that there should be a description of them by boundaries, or even by name. The plaintiff was confined to evidence of an entry on some one close, of which he had possession. 2 Waterman on Trespass, § 993. If there was a necessity for a description of the premises, to avoid inconvenience or embarrassment to the defendant, the plea of *liberum tenementum* drove the plaintiff to a new assignment, describing with exactness the close broken. In the indictment intended for the redress of like injury, committed under the special circumstances pointed out in the statute, and which of themselves afford the defendant full information of the particular premises upon which the wrongful entry is charged, there is no reason for requiring a more exact description of them, than was necessary in a declaration for the injury at common law. The statute dispenses with a statement of the venue, or place of committing the offense (Code of 1876, § 4787); and an averment that the lands were within the county, in which the action is brought, is not necessary in the corresponding civil action.—*Pike v. Elliott*, 36 Ala. 69. Pursuing the words of the statute—averring that the entry was without legal cause or excuse, after warning within six months preceding not to do so, into the dwelling-house, or on the premises of another, who is named—fully informs the defendant of every material fact necessary to be proved. An averment of the county in which the dwelling-house or premises are situate, would be no more than matter of description, or of the venue. As matter of description, it is not necessary; and as matter of venue, it is dispensed with by the statute.

2. There was no error in admitting as evidence the copy of the written notice not to enter on the premises, delivered to the defendant. Of itself, it is a warning to the defendant against such entry; and it was intended to satisfy the requirements of the statute. It is not the mere wrongful entry the statute punishes, but such an entry after warning against it by the possessor within the six months next preceding such entry. The warning is no more than notice to the defendant to abstain from the wrongful entry. It is not required to be in writing, but there is a propriety in reducing it to writing, for there will then be more certain and enduring evidence of its terms. It is of the same nature as a notice to quit, given by a landlord to his tenant, which may be written or verbal. When written, a copy of it may be used

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as evidence, without notice to produce the original.—*Eisenhart v. Slaymaker*, 14 S. & R. 156; *Morrow v. Commonwealth*, 48 Penn. 305; 1 Whart. Ev. § 162. The reason is thus stated, by GIBSON, C. J.: “Every written notice is, for the best of all reasons, to be proved by a duplicate original; for, if it were otherwise, the notice to produce the original could be proved only in the same way as the original notice itself; and thus a fresh necessity would be constantly arising, *ad infinitum*, to prove notice of the preceding notice; so that the party would, at every step, be receding, instead of advancing.”

3. The proceedings before a justice of the peace, in actions for forcible entry and detainer, or for unlawful detainer, are required to be in writing; and he and his successors in office are the legal custodians of them. The decision rendered by the justice, he is expressly required to record; and the final process he issues, is an execution for costs, and the restitution of the premises, when the judgment is for the plaintiff. Code of 1876, § 3702. No other evidence of the existence and contents of the proceedings in such actions, and of the judgment rendered by the justice, than the original documents, or examined, sworn copies, ought to have been received, without accounting for the absence of the original, or showing the impossibility of producing examined copies. *Kennedy v. Dear*, 6 Porter, 90; *Jones v. Davis*, 2 Ala. 730. The loss or destruction of such documents being proved, secondary evidence of their contents is admissible; and, like any other fact, the loss may be proved inferentially.

4. The proof of loss or destruction of these documents we do not think was sufficient. It is not a just inference from the fact that the docket of the justice was in the court-house six or eight months before it was burned, that it remained there until the burning and was destroyed. There seems to have been no proof in respect to any other book or paper than the docket. That would not show more than the judgment rendered, and there seems to have been no effort to obtain, or to account for the prior proceedings; nor was there evidence that on the docket the judgment was recorded. No inquiry seems to have been made of the successor of the justice, in reference to the documents, in whose custody, if they exist, it is presumed they can be found. The admission of secondary evidence of the contents of writings, depends upon evidence that the party offering it has honestly made all reasonable efforts to produce the original; and he must satisfy the court that it is not in his power to produce it. Fuller proof should have been made than is found in the bill of exceptions, before resorting to the parol evidence of

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the proceedings before, and the judgment rendered by the justice, in the action of unlawful detainer against the defendant.

5. The destruction of the proceedings in the Court of Probate, for the sale of the lands, was satisfactorily shown, and there was no error in receiving secondary evidence of them. They were of the files and records of the court, kept in obedience to law in the court-house; and proof of the burning of the court-house, and that the records and papers there deposited were consumed, necessarily opened the way for secondary evidence of the contents of all such documents, unless there had been evidence that they could be found elsewhere.

6. In civil actions for a malicious prosecution, and other kindred actions, of which malice and a want of probable cause are indispensable elements, and in which the presumption of malice obtains from proof of a want of probable cause; to repel that presumption, so far as the jury may deem it repelled by the proof, the defendant is permitted to show that he made a fair, truthful statement of the facts to counsel, who advised the institution of the prosecution, and that in instituting it he relied and acted on such advice. We are not aware that a defendant has ever been permitted to mitigate, or justify, or excuse a trespass upon the property of another, because he acted under the advice of counsel. When that advice is permitted to be proved, in the civil actions to which we have referred, the utmost effect it can have is to reduce the recovery of the plaintiff to actual damages sustained from the wrong of the defendant. It does not convert that wrong into a right, nor afford any justification for it.

7. It is not necessary to pass separately on the several instructions which the Circuit Court refused to give on request of the appellant. The indictment can not be supported, if, when the notice or warning was given, the defendant had actual possession of the premises, claiming title thereto, or claiming to hold them against Acree, from whom the notice proceeded. The statute is intended for the protection of the possession of real estate, against the entry of intruders or trespassers; and it can not be made to serve all the purposes of an action of trespass *quare clausum fregit*, nor converted into an action of ejectment, in which the title and right of possession may be determined. A wrong-doer in actual possession, though the constructive possession may reside in him in whom the title is vested, can not be warned off, and proceeded against under the statute. Such of the instructions requested as were in accordance with this view, ought to have been given. Nor can the indictment be supported,

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if at the time of the entry, though made after warning by Acree, who, by himself or tenant, had or claimed the actual possession, the title and right of entry to the premises resided in the defendant. The statute was not intended to convert the entry of the true owner into an indictable offense, or to deprive him of any right he could have exercised before its enactment. But no mere claim of title, however sincerely made, can justify or excuse the trespass, if it is committed after warning. The good faith of the claim is more justly and properly vindicated by a resort to remedies for its enforcement, than by an intentional entry on premises of which another has possession, and notifies or warns the defendant to abstain from entering upon them.

For the errors noticed, the judgment must be reversed, and the cause remanded; but the appellant must remain in custody, until discharged by due course of law.

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Indictment for Larceny of Part of Growing Crop of Corn.

1. *Larceny of growing corn or cotton.*—An outstanding crop of cotton or corn—that is, cotton or corn growing, or unsevered from the freehold—is by statute made the subject of grand larceny (Code, § 4358); but it is not the subject of petit larceny, either at common law, or by statute, being regarded as realty, or a part of the freehold.

2. *Same; sufficiency of indictment.*—An indictment which charges that the defendant “feloniously took and carried away one peck of corn, a part of an outstanding crop of corn, of the value of twenty-five cents, the personal property of H.,” is self-contradictory, and fatally defective; and neither of the descriptive averments can be struck out as surplusage.

FROM the Circuit Court of Hale.

Tried before the Hon. GEO. H. CRAIG.

The indictment in this case contained two counts. The first charged, that the defendant “feloniously took and carried away one peck of corn, a part of an outstanding crop of corn, of the value of twenty-five cents, the personal property of Ned Jones, *alias* Edward Jones, and William Hurt;” and the second, that he “feloniously took and carried away one peck of corn, a part of an outstanding crop of corn, the personal property of Harris Waller.” The defendant demurred to the whole indictment, and to each count separately, on the ground that they were self-contradictory and repugnant, and charged no offense. The court overruled the demurrer, and

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he then pleaded not guilty; on which plea issue was joined. The verdict of the jury was, "guilty as charged in the indictment;" and the court thereupon sentenced the defendant to hard labor for the county for two years.

THOS. SEAY, for the defendant.—The two descriptive averments of the indictment—that the stolen corn was "part of an outstanding crop of corn," and that it was "personal property"—are repugnant and inconsistent with each other; and the court has no authority to strike out either as surplusage.

H. C. TOMPKINS, Attorney-General, for the State.—Each count of the indictment charges that the stolen corn was "part of an outstanding crop of corn;" and the sufficiency of this averment is not affected by the additional averment that it was personal property, or that it was of the value of twenty-five cents. The averments may be regarded as superfluous, and stricken out.—1 Wharton's Amer. Crim. Law, §§ 293, 622; *Stedman v. The State*, 7 Porter, 495; *Commonwealth v. Eastman*, 4 Gray, 416; *Regina v. Radley*, 1 Dennison, 453; *Rex v. Morris*, 2 Leach, C. C. 525; *Commonwealth v. Moseley*, 2 Va. Cases, 154. It may well be contended that, so far as the offense is concerned, the statute makes an outstanding crop personal property.

MANNING, J.—By a statute of this State it is enacted, that "any person who steals . . . any part of any outstanding crop of corn or cotton, . . . is guilty of grand larceny, and must, on conviction, be imprisoned in the penitentiary, or sentenced to hard labor for the county, for not less than two, nor more than five years."—Code of 1876, § 4358.

As was said in *Gregg v. The State* (55 Ala. 117), this statute, "so far as it relates to an outstanding crop of corn or cotton, creates a new offense, unknown to the common law. Corn or cotton growing, or unsevered from the freehold, partakes of the nature of realty, and, in the absence of the statute, is not the subject of larceny. . . . There is no statute, or principle of the common law, which declares that it is a public offense to take or carry away growing or ungathered corn, under any circumstances other than those which, under the act of February 20th, 1875" (the same set forth as above in the Code), "make it a felony, and punish it as such. It follows from this, that, while an outstanding crop of corn or cotton may be the subject of *felonious* larceny, it cannot be the subject of *petit* larceny." And further

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"While the statute declares it is felony to steal any part of an outstanding crop of corn or cotton, *without reference to its value*, there is no such provision as to any of the subjects of petit larceny. . . . An indictment for the offense last named *must aver some value* of the article alleged to be stolen." As to the amount of this value, compare sections 4358 and 4361 of the Code of 1876. To the same effect as the case just cited, is that of *Holly v. The State*, 54 Ala. 238.

In the indictment now under consideration, there are two counts, to each of which a demurrer was interposed. The first charges, that defendant "feloniously took and carried away one peck of corn, a part of an outstanding crop of corn, of the *value of twenty-five cents*, the *personal* property of Ned Jones . . . and William Hurt;" and the other charges, that he feloniously took and carried away "one peck of corn, a part of an outstanding crop of corn, the personal property of Harris Waller." The verdict was "guilty as charged in the indictment."

The objection made to these counts is, that they are self-contradictory, inconsistent with themselves, and so uncertain as to make it doubtful what the offenses are which they charge. True, each count alleges that the "peck of corn" which defendant "took and carried away," was a "part of an outstanding crop of corn." But it alleges, also, that it was "personal property," and the first one alleges further, that it was of "the value of twenty-five cents," as if to emphasize the offense as that of petit larceny. Are these parts of the indictment to be treated as surplusage, or not—mere excess of language, which may be rejected; or are they matter of description and substance?

It is said, that the designation of the property stolen, as personal property, cannot affect the validity of the indictment, any more than the description of a horse, in an indictment for the larceny of that animal, as real property, would make the indictment void; and the argument is a plausible one. But there is this difference in the cases: A horse cannot, under any circumstances, be realty. Of the two kinds of property, real and personal, a horse, and other like chattels, must necessarily be always personal. But of corn it is different. While it is on the stalk, not severed from the realty, it partakes of the realty, and, by the common law, was not the subject of larceny, though it might be of trespass. But, at the moment of severance, it becomes, and continues to be, personalty. This indictment, therefore, makes it uncertain whether, at the time defendant took and carried away the corn here referred to, it had been severed, and ceased to be a part of the outstanding crop, or not.

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It is said that the additions, setting forth the value of the corn stolen, and that it was personal property, are mere surplusage, and, if stricken out, leave a perfect indictment under the statute. But, if you strike out the addition, "part of an outstanding crop of corn," you then also have a perfect indictment for the larceny of personal property. What authority have we for making one of these amendments in an indictment preferred by a grand jury acting under oath, rather than the other?

The jury found defendant "guilty as charged in the indictment." Suppose the circuit judge had not heard any of the evidence (and though he did, he was not made the judge of what it proved); or, suppose defendant had pleaded simply "guilty" (especially to the first count); how could the judge certainly and judicially know, there being but a single offense, whether the sentence should be for grand or petit larceny. In this case, it was for grand larceny.

We think it important that such looseness and ambiguity in legal documents of this kind, having their origin in the courts, and made up under the supervision of official legal advisers, ought not to be allowed.

Let the judgment of the Circuit Court be reversed, and the cause remanded; defendant to remain in custody, until discharged by due course of law.

In *Holly v. The State, supra*, we notice an inconsistency in the case as reported, and as stated in the opinion. We have examined the original record, and find that the indictment charged, exactly as set forth in the opinion, that defendant "feloniously took and carried away fifteen ears of corn, a portion of an outstanding crop, the property" [not "personal" property] "of William Russell." The errors in the printed report are not those of the court.

Jones v. The State.

Indictment for Carrying Concealed Weapons.

1. *Sufficiency of indictment, in averment of defendant's Christian name.*—An indictment which describes the defendant as "Douglas Jones, alias Dug Jones, whose true Christian name is to this grand jury unknown," is inconsistent and self-repugnant, and will not support a conviction.

FROM the Circuit Court of Washington.

[Jones v. The State.]

Tried before the Hon. H. T. TOULMIN.

The indictment in this case, containing only one count, charged that "Douglas Jones, *alias* Dug Jones, whose true Christian name is to this grand jury unknown, carried a pistol concealed about his person," &c. After conviction, the defendant moved in arrest of judgment, on account of the insufficiency of the indictment; which motion the court overruled, and the defendant excepted.

F. B. CLARK, Jr., for the defendant.—Neither the common law nor the statute authorizes such averments as are contained in this indictment.—Clark's Manual, § 2189, and authorities there cited; Code, § 4786. The averments are contradictory of each other, and make the indictment bad for duplicity.

H. C. TOMPKINS, Attorney-General, for the State, cited *Lee v. The State*, 55 Ala. 259; 6 Mod. 116; 1 Camp. 479.

STONE, J.—On a former day of this term, we announced that this case was affirmed, on the authority of *Lee v. The State*, 55 Ala. 259. In that case, the defendant was described as "Eli E. Lee, *alias* Tobe Lee." We held there was nothing in the objection, that the Christian name of the defendant was stated under an *alias dictus*. In the present case, the defendant is described and charged as "Douglas Jones, *alias* Dug Jones, whose true Christian name is to this grand jury unknown." The principle on which we heretofore affirmed this case was, that the true interpretation of the language of this indictment is, that the grand jury, in their finding, affirmed that the defendant's Christian name was either Douglas Jones or Dug Jones, but they did not know which of these was the true Christian name. The principle of our decision would have led to the conclusion, that, unless the Christian name of the accused was either Douglas or Dug, then he was incorrectly described. We overlooked the fact, that by this construction, we gave no operation whatever to the words, "whose true Christian name is to this grand jury unknown;" for the precedent words, "Douglas Jones, *alias* Dug Jones," mean precisely the same thing—nothing more, nothing less. Part of the sworn duty of the grand jury is, to "diligently inquire, and true presentment make."—Code of 1876, § 4755. This duty extends to the ascertainment and presentment of every material fact necessary to constitute a good indictment. Identification of the accused is one of the material facts to be averred; and this is usually done by giving his name. But cases will, and do

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arise, in which the grand jury do not know, and can not learn, either some name, or some other material fact to be averred. In such case, unless it be some material ingredient of the offense, without which no crime or misdemeanor would be imputed, the name or fact, as the case may be, may be averred as to the grand jury unknown.—Code of 1876, §§ 4786, 4789, 4790. But this rule is born of necessity, and when the necessity does not exist, the rule does not exist. It is only when the name or fact is *unknown* to the grand jury, the authority to employ that form of expression or charge is permitted. So, when the name or fact is known to the grand jury at the time the indictment is found, the averment that it is unknown is not a true presentment; and if the fact of such knowledge is shown on the trial, it is the duty of the court not to allow a conviction to be had on that indictment, and to direct his acquittal, that a new indictment may be preferred, setting forth the facts truly. In *Duval and Pelham v. The State*, at this term, we had occasion to consider this question; and we there held, that the question is one of variance between the facts found by the grand jury, and the facts developed on the trial before the petit jury.

We confess ourselves somewhat at a loss in determining the true meaning and purpose of the averment in the indictment that the true Christian name of the accused was unknown to the grand jury. They had just averred it was Douglas, or Dug; and if it was either, the indictment was sufficient, under *Lee's* case. Such averment is the equivalent of saying, either that he was known and called by each of the names, or, possibly, that his true name was one or the other, the grand jury did not know which. If the additional averment had been, "but which of said names is his true Christian name, is unknown to this grand jury," it would have added nothing to the strength or clearness of the indictment, and would probably be treated as surplusage. But that is not its import. It first avers it is one or both of the two names, specifying them, and thus proving that much was known to the grand jury, and then avers his Christian name was unknown. These averments, stated cumulatively, are not consistent with each other. They, in effect, charge the name both as known and unknown, thus making the indictment repugnant to itself. This is such an innovation on the rules of pleading—on the constitutional right of every one accused "to demand the nature and cause of the accusation" against him, and to be accused only "in cases ascertained by law, and according to the forms which the same has prescribed," that we are unwilling to give it sanction.—Declaration of Rights, sections 7 and 8.

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We reverse and remand the cause to the Circuit Court, that the indictment may be there quashed. Let the defendant remain in custody, until discharged by due course of law.

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Indictment for Murder.

1. *Special terms of court; validity of indictment and trial at.*—Under the statute (Code, §§ 652-3), a circuit judge has power to convene a special term of the court, in any county in his circuit, whenever, in his opinion, a special term is necessary; the jurisdiction and authority of the court at a special term, convened in pursuance of the statute, are as plenary as at a regular term; an indictment, found by a grand jury organized at such special term, is valid, and a trial and conviction under it are neither illegal nor irregular.

2. *Statutes in Code, not originally conforming to constitutional rules as to revising and amending laws.*—The Code of 1876, purporting to embrace all public statutes, of a general and permanent nature, of force at the time of its adoption, was enacted in conformity to the provisions of the constitution; and any statute therein included, though not originally conforming to the rules prescribed by the constitution as to revising and amending laws, became valid from the day the Code went into operation.

3. *Objections to array of grand jury.*—The statutory provisions regulating the drawing and summoning of persons to serve as grand jurors, are expressly declared to be directory (Code, § 4759); and any departure from them, which works no injury to the accused, is no ground of objection to the whole array.

4. *Competency of petit juror, as affected by opinion as to guilt or innocence of accused.*—Under the statute (Code, §§ 4881-82), as at common law, it is good ground of challenge for cause, that the proposed juror has a fixed opinion as to the guilt or innocence of the accused, which would bias his verdict. But, at common law, this might be made a collateral issue, and proved or disproved by other evidence than the oath of the person proposed as a juror; while the statute submits the inquiry to the sworn conscience of the juror himself, and from his testimony alone the court must determine whether he is competent. Yet, if a person having a disqualifying opinion as to the guilt of the accused should procure acceptance as a juror, whether through design or ignorance on his part, a verdict of guilty, in which he participated, would be set aside by the court, on motion for a new trial, supported by proper evidence.

5. *Same.*—The “fixed opinion as to the guilt or innocence of the defendant, which would bias his verdict,” and render the person incompetent as a juror, must be such as would prevent him from rendering a verdict in accordance with the evidence as disclosed on the trial, and the law as pronounced by the court: an opinion founded merely on rumor, or formed on the hypothesis of the truth of the facts which he has heard, and without the hearing of other facts which may contradict them, or lessen their weight, does not disqualify him.

6. *Same.*—A person who says that, “from what he had heard, he had an opinion that the prisoner had killed some one, but none whether the killing was justifiable or not,” is not incompetent as a juror; nor a person who says that he “can’t help believing what he has heard.”

7. *Same; examination of proposed juror.*—After the court has examined a proposed juror, it is not error to refuse to allow the prisoner’s counsel to ex-

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amine him, for the purpose of ascertaining whether he is not subject to challenge for cause.

8. *Standard medical treatises as evidence.*—The principle is settled by former decisions of this court, that standard medical books, in connection with proper explanation, when necessary, of the terms used, may be read to the jury as evidence in a criminal case.

FROM the Circuit Court of Limestone.

Tried before the Hon. W. B. WOOD.

The prisoner in this case, John H. Bales (or Bailes), was indicted for the murder of his wife, Mary Alice Bailes, in May, 1879, by shooting her with a pistol. The indictment was found at a special term of said Circuit Court, held on the third Monday in July, 1879; and the trial was had at the same term. The special term was held in pursuance of an order made by Hon. W. B. WOOD, the judge of the fourth judicial circuit, on the 4th June, 1879, which is copied in the transcript, and in which it is recited that a special term is ordered by the judge, "being of opinion that a special term of said court is necessary for the disposal of such criminal business as may be brought before it." The order directed the proper officers to draw and summon grand and petit jurors for the special term, and that the order itself should be published in the *Athens Post*, a newspaper published in Limestone county, for thirty days before the commencement of the special term. The minute-entry recites that the special term was held in pursuance of the order, and that the order had been published in accordance with its own requirement. The *venire* of persons summoned as grand jurors, eighteen in number, is set out; all of whom appeared, and, three being excused by the court, the remaining fifteen were organized as the grand jury, and returned the indictment into court on the 21st July. Fifty persons were also summoned as petit jurors; but this *venire* being quashed, on motion of the prisoner, one hundred persons were ordered to be summoned as jurors, a list of whom, with a copy of the indictment, was served on the prisoner, under the order of the court, one day before the day appointed for his trial.

Being duly arraigned, the prisoner demurred to the indictment, and moved to quash it, and filed several pleas in abatement; insisting that the court had no power or jurisdiction, at said special term, either to institute proceedings against him, or to try him, and that the indictment was void. The court overruled the demurrer and the motion to quash, and sustained demurrers to the pleas in abatement. The prisoner also moved to quash the *venire* of petit jurors, because two of the names therein mentioned were not in the list served on him; but the court ordered these two names to be

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discarded, and overruled the motion. The prisoner also challenged the array of petit jurors, because forty-eight persons were summoned as regular jurors, instead of thirty (Code, § 4738); but the court overruled the challenge, and the prisoner excepted. Issue being joined on the plea of not guilty, the trial then proceeded.

The name of J. H. Allison being drawn as a juror, he was examined by the court touching his qualifications; and having stated, among other things, that "he has no fixed opinion as to the guilt or innocence of the defendant, which would bias his verdict," and being declared a competent juror by the court, he was accepted by the State. "Being asked by the prisoner, if he had not formed an opinion as to his guilt or innocence, said Allison answered, that, 'from what he had heard, he believed defendant was guilty of murder, but did not know that this would bias his judgment.' The prisoner then challenged said Allison for cause as a juror, but the court overruled and refused to allow said challenge; to which the prisoner duly excepted, and then challenged said Allison peremptorily."

The name of E. W. Higgins being drawn by the clerk, "said Higgins was duly sworn, and examined by the court; and the same questions being asked him, and like answers returned, as in the case of said Allison, he was pronounced a competent juror, and was accepted by the State; and then, in answer to questions by the prisoner, he said, that he had not talked with the prosecutor about this case, but has now an opinion, formed from rumor, as to the guilt of the prisoner." The prisoner thereupon challenged said Higgins for cause, but the court overruled and refused to allow the challenge; to which the prisoner excepted, and then challenged said Higgins peremptorily.

The name of A. W. Stroud being drawn by the clerk, said Stroud was sworn and examined by the court; and being pronounced competent as a juror, he was accepted by the State. "The prisoner then asked said Stroud, if he has formed an opinion as to his guilt or innocence; and said Stroud answered, 'I can't help believing what I have heard.' The prisoner then challenged said Stroud for that cause, but the court refused to allow said challenge for cause; and thereupon the prisoner duly excepted to this ruling, and challenged said Stroud peremptorily."

The name of A. W. Eaton being drawn, he was duly sworn and examined by the court; and being pronounced competent as a juror, he was accepted by the State. "In answer to questions then put by the prisoner, said Eaton stated that, from conversations with our best citizens, in whom he had

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every confidence, he had formed the opinion that the prisoner had killed some one, but none as to whether he was justifiable or not; that he now has that opinion—namely, that he killed some one—but this might be removed by evidence; that it would require some evidence to remove that opinion, but that this belief would not bias his verdict. Thereupon the prisoner challenged said Eaton for cause, and, said challenge being overruled and refused by the court (to which the prisoner duly excepted), he also challenged said Eaton peremptorily.”

The name of one Lemuel Smith being drawn, he was sworn and examined by the court; and being declared by the court to be a competent juror, he was accepted by the State. “The prisoner then proposed to ask said Lemuel Smith, for the purpose of ascertaining a ground of challenge for cause, if he was born in the United States, or had ever been duly naturalized; also, if he had been a freeholder or householder for the last twelve months, and if he owned any legal or equitable interest in any lands. The court refused to permit any or either of said questions to be put to said Smith, as grounds of challenge for cause, he having been declared competent by the court, and accepted by the State; but allowed the prisoner to ask any and all such questions to ascertain grounds for acceptance or peremptory challenge, and required the prisoner to accept said Smith or to challenge him peremptorily; to which ruling and action of the court the prisoner duly excepted, and then challenged said Smith peremptorily.” Similar rulings were made, and exceptions duly reserved, as to John S. Tucker and E. S. Strange, each of whom was also challenged peremptorily by the prisoner.

The defense of insanity was interposed by the prisoner, and evidence was introduced in support of it; and in this connection, the prisoner’s counsel proposed to read to the jury, as evidence, extracts from *Taylor’s Medical Jurisprudence*, *Beck’s Elements of Medical Jurisprudence*, and *Ray’s Medical Jurisprudence of Insanity*, which were proved to be standard medical treatises, and recognized as such by the medical profession. The court rejected this evidence, and the prisoner excepted to its exclusion.

Several other exceptions were reserved by the prisoner, which, under the opinion of this court, require no particular notice.

E. T. TALIAFERRO, JOS. B. McDONALD, J. J. TURRENTINE, and JAMES BENAGH, for the prisoner.

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H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—By the statute (Code of 1876, §§ 652-3), which is shown by the record to have been strictly pursued, a judge of the Circuit Court has full power to convene “a special term, in any county in his circuit, whenever, in his opinion, a special term is necessary.” The exercise of the power rests wholly in the discretion of the judge, and his conviction of the necessity for the term. The statute provides further, that, “at such special term, the judge shall have the same power, jurisdiction, and authority to organize a grand jury, and to try and dispose of all causes, both civil and criminal, that may come before the court, and to do and perform all the business of such court, as at a regular term.” The jurisdiction and authority of the court at a special term, convened in pursuance of the statute, is as plenary as at a regular term; and an indictment found by a grand jury, organized at such term, is valid; and a trial, and judgment of conviction, are not illegal, nor irregular.—*Nugent v. The State*, 19 Ala. 540; *Harrington v. The State*, 36 Ala. 236; *Aaron & Ely v. The State*, 39 Ala. 684.

2. Whether the mode of legislative procedure, prescribed by the last clause of the second section of the fourth article of the constitution of 1868, was observed in the original enactment of this statute, is not a question of any importance in this cause. It was introduced into, and forms part of the present Code, which, in all its parts and provisions, was enacted in conformity to the constitution, and embodies all public statutes, of a general and permanent nature, of force in the State.—*Dew v. Canningham*, 28 Ala. 466; *Hoover v. The State*, 59 Ala. 57. It may embrace statutes not originally enacted in the forms prescribed by the constitution; and if that be true, they are valid, not from the day of their original enactment, but from the day the Code became operative.

3. The special term being held “for the disposal of such criminal business as may be brought before it,” following the words of the order convening it, and the trial of the accused, charged with an offense which could be punished capitally, being a part, if not the exclusive business it was contemplated would come before the court, the statute required that fifty persons should be drawn to serve as petit jurors; and in the drawing shown in the record, it was observed.—Code of 1876, § 4739. Besides, the statutory provisions are expressly declared to be directory; and a departure from them, which works no injury to a party accused of

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a criminal offense, can not be made the ground of objection to the whole array.—Code of 1876, § 4759.

4. The Bill of Rights declares: "That the right of trial by jury shall remain inviolate;" and guarantees to the accused, "in all prosecutions by indictment, a speedy public trial, by an impartial jury of the county or district in which the offense was committed;" and further, that he shall not "be deprived of his life, liberty, or property, but by due process of law." Impartiality is the highest, most indispensable qualification of a judge, or of a juror—freedom from bias, prejudice, passion, or interest. Impartiality, independence, in each individual juror, who is to sit in judgment upon the life, liberty, or property of his peer, so far as it may be expected from men having common interests, hopes, and fears, it is the purpose of all our legislation to secure. Before administering the oath to any person summoned and appearing as a grand or a petit juror, it is the *imperative* duty of the court to ascertain whether he is competent to discharge the duties with honesty, impartiality, and intelligence, and is esteemed in the community for integrity, fair character, and sound judgment.—Code of 1876, § 4760. And the officers charged with the duty of drawing and selecting jurors, are commanded not to select any other persons, than such as, in their opinion, are of these qualifications.—Code of 1876, § 4733.

The statute enumerates seven grounds, which are the subject of a challenge for cause, by either the State, or the accused; and two, which are grounds of such challenge by the State only. These two—a fixed opinion against capital or penitentiary punishment, and that a conviction should not be had on circumstantial evidence—are favorable to the accused, and of prejudice only to the State.—Code of 1876, §§ 4881–83. It is the usual practice, and was pursued in this case, for the court to examine, or cause each person, as he is drawn as a juror, to be examined on his *voir dire*, to ascertain if he is subject to any of these grounds of challenge. On the examination, four persons were challenged by the accused, because each disclosed, as it was supposed, that he *had a fixed opinion as to the guilt or innocence of the accused*; in other words, that he was not impartial—was not free from bias and prejudice against the accused. This ground of challenge, under the statute, is provable alone by the oath of the juror.

The common law jealously excluded from the jury-box all who had prejudged the particular cause—all who, by passion, or prejudice, or bias, from whatever cause it proceeded, had disqualified themselves from passing upon it impartially.

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It is the common-law principle which the statute was intended to embody, expressed in phraseology the legislature deemed the most intelligible and most comprehensive. If it would be competent for the legislature to narrow the principle of the common law, and introduce into the jury-box the man of prejudice—the judge in advance of a hearing, and of deliberation after hearing—that purpose is not indicated in the statute. The disqualification at common law, and under the statute, is, that the person proposed as a juror holds an opinion, as to the guilt, or as to the innocence of the accused, disqualifying him from rendering a verdict in accordance with the evidence as it may be delivered by the witness, and the law as it may be pronounced by the court. The holding of such an *opinion*, such a *judgment*, or *belief*, all authorities at common law concurred in pronouncing sufficient to compel his exclusion, whatever diversity of opinion there may have been as to the mode of ascertaining, or as to the facts which showed its existence.

This cause of challenge could, at common law, become a collateral issue, submitted to triers summoned for that purpose; and it was the matter of proof or disproof, by other evidence than the testimony of the proposed juror. Under the statute, it can not be proved or disproved, otherwise than by his oath; and the court, without the intervention of triers, determines its existence. Yet, there can be no doubt, if a juror, having a disqualifying opinion, should introduce himself into the jury-box, by concealing, or by failing to disclose it from mere ignorance, a conviction by a verdict in which he participated would be set aside, on an application for a new trial, supported by proper evidence. The whole purpose of the statute is to simplify the inquiry into the existence of this cause of challenge, and to avoid the many objections to jurors, sometimes narrow, too often interposed at common law, embarrassing, rather than promoting a fair, just, impartial administration of the criminal law.—*Carson v. The State*, 50 Ala. 134. The inquiry is submitted to the sworn conscience of the proposed juror; and from his testimony it must be determined whether he is, or is not, subject to this disqualification. Propounded in the formula of the statute, a positive, direct answer is not often, in practice, obtained to the inquiry. If it is, and is affirmative, the juror is generally excluded, without further inquiry; and properly so, for it would be unsafe to introduce him into the jury-box, if that is his own conviction as to the state of his mind, though, after explanations proceeding from the court, or made in its presence and with its sanction, he should declare that he has no fixed opinion, which would bias his verdict.

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While the administration of the statute must not encourage objections, because the person proposed may entertain hypothetical opinions, care must be taken that none but good and true men, free from an opinion which would bias their verdict, are introduced as jurors.

5. The juror Allison declared, that he had not a fixed opinion as to the guilt or innocence of the accused, which would bias his verdict. Upon interrogation by the counsel for the prisoner, he stated that, from what he had heard, he believed the prisoner was guilty of murder, but did not know that this would bias his judgment. Crime can not be committed without attracting the attention of the community, to a greater or less degree, in the locality of its commission. The greater the crime, the greater is the degree of attention. Such a crime as that imputed to the prisoner, will shock the moral sense, and arouse the indignation of any civilized community; and if there be any who do not hear of it, and the circumstances narrated as attending its commission, they are generally the obscurest and least intelligent of the community. If all who hear of it, and form an opinion from the circumstances as they become notorious, are excluded, it would be almost an impossibility to obtain a jury for the trial of the person charged, in the district or county in which the offense was committed. Such opinions, formed on the hypothesis of the truth of the facts which have been heard, and without the hearing of other facts which may contradict them, or lessen their weight, is not the fixed opinion, to which the statute refers; nor was it a disqualification, according to the better authorities, at common law. There was no error in overruling the challenge of Allison. Nor was there any error in overruling the challenge of Higgins, whose opinion was founded merely on rumor.—*Epes' case*, 5 Gratt. 674; *Armstead's case*, 11 Leigh, 657; *The State v. Morea*, 2 Ala. 275; *Williams v. The State*, 3 Stew. 454.

6. The juror Eaton, who, from what he had heard, had an opinion, that the prisoner had killed some one, but none whether the killing was or not justifiable, was not disqualified.—Whart. Cr. Law, § 2989. Nor was it disclosed that Stroud was an incompetent juror. The examination proceeded no further, than to draw from him the declaration, that "I can't help believing what I have heard." What he had heard, whether it had induced a fixed opinion of the guilt or of the innocence of the prisoner, did not appear. If it was of the innocence of the prisoner, it would not have been, at his instance, a challenge for cause. Enough was not shown to indicate that he had a fixed opinion of the guilt

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of the prisoner, and that alone could have supported the challenge he made.

7. The proposed examination of Smith, Tucker and Strange, to ascertain whether they were subject to challenge for cause, after they had been examined by the court, was properly refused. We know of no authority, and we perceive no reason for any such speculative, inquisitorial practice, consuming needlessly the time of the court, and offensive to the persons subjected to it. The rule is ancient, that neither party has a right to interrogate a juror before he is challenged.—1 Chitty's Cr. Law, 543-44; *King v. Edmonds*, 4 Barn. & Ald. 671.

8. In *Stoudenmeier v. Williamson*, 29 Ala. 558, this court held, that standard medical books, in connection with proper explanation of the terms used, if such explanation was necessary, could be read in evidence to the jury. The decision was followed in *Merkle v. The State*, 37 Ala. 139. The rule is consequently established here, and since these decisions, we presume, has been of frequent use in the primary courts. The Circuit Court was, consequently, in error, in rejecting as evidence the extracts from the books, which were shown to be of high authority in the medical profession.

We do not deem it necessary to consider the other questions raised upon the record. The error pointed out compels a reversal of the judgment, and the cause will be remanded. Let the prisoner remain in custody, until discharged by due course of law.

Hardin v. The State.

Indictment for Carrying Concealed Weapons.

1. *Evidence showing threatened or apprehended attack.*—Under an indictment for carrying concealed weapons (Code, § 4109), the defendant having proved, to establish the defense of a threatened or apprehended attack, that he had been forcibly seized by night, a few months before the time specified by the witness for the prosecution, by a party of armed men, some of whom resided in Alabama, and others in Georgia, and carried off to a distant place, where he was set at liberty after some judicial proceeding before a magistrate; and that the persons engaged in this attack, whose names were mentioned, and who resided near him, had declared that "they intended to take him and carry him off again, and that they would as soon shoot him as to shoot a hog," which threats were communicated to him; it is permissible for him to further prove "that said parties were prowling through the country, armed, and without any employment, sometimes for a while in Georgia, dodging in and out of Alabama."

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2. *Exceptions to charges given or refused.*—Exceptions to the rulings of the court below, in the matter of charges given or refused, will not be considered by this court, when the error complained of "was not so specified as to call the attention of the judge and the adverse counsel to the particular matter supposed to be injurious to the party excepting "

From the Circuit Court of Cherokee.

Tried before the Hon. JOHN HENDERSON.

No counsel appeared in this court for the defendant, so far as the record and dockets show ; and there is no brief on file.

HENRY C. TOMPKINS, Attorney-General, for the State.

MANNING, J.—According to section 4109 of the Code of 1876, "any person who, not being threatened with, or *having good reason to apprehend an attack*, . . . carries concealed about his person a bowie-knife, or any other knife, or instrument of like kind or description, or a pistol, or fire-arms of any other kind or description, or an air-gun, must be fined, on conviction, not less than fifty, nor more than three hundred dollars, and may also be imprisoned," &c. ; and according to section 4809, "the excuse, if any, must be proved by the defendant, to the satisfaction of the jury."

Appellant was indicted, and found guilty of the offense of carrying a pistol concealed about his person, contrary to law. The locality of the act was near the State line between Alabama and Georgia ; and it was proved in his defense, that some months before appellant had been taken from his house, with threats and violence, after midnight, by a number of armed men, some residing in Alabama, and others in Georgia, and none of them having any "avocation or employment in the county," and was carried by them, hand-cuffed, and without any warrant of arrest, out of the State, to a railroad station, and thence by railroad to some place in the State of Alabama ; where, it is to be inferred from the evidence, he was set free, after some sort of a hearing, by a magistrate of this State. It was further admitted by the State's attorney, as proved, that after appellant was so set free, his captors, whose names are set forth in the bill of exceptions, and who resided within a few miles of his residence, declared "that they intended to take the defendant, and carry him off again, and that they would as soon shoot the defendant as to shoot a damned hog ;" notice of which threats was communicated to him. It was also in evidence, that they "were prowling through the country, armed, and without any employment, sometimes for a while in Georgia,

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dodging in and out of the State of Alabama." This latter evidence was, upon motion of the State's attorney, excluded from the jury, against the objection and exception of defendant.

The evidence excluded manifestly tended, if the jury should believe it true, to establish an excuse which the law allowed, for appellant's carrying a pistol concealed about his person; to-wit, that he had "good reason to apprehend an attack." It was not objected that the fact of prowling and dodging about, without employment, was not sufficiently proved by legal testimony; but the evidence appears to have been ruled out on the ground, that the circumstances proved were not relevant. In this we think the circuit judge erred.

We do not pass upon the question, whether there was error or not in the charges of the circuit judge to the jury, or in his refusals to charge as requested; because, in some respects, they were certainly not erroneous; and in those in which there may be error, it was not so specified as to call the attention of the judge and the adverse counsel to the particular matter in the charges or refusals to charge, which was supposed to be injurious to defendant.

Let the judgment be reversed, and the cause remanded.

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Indictment for Assault with Intent to Murder.

1. *Objections to grand jury, as defense to indictment.*—Under the statutes now of force (Code, §§ 4732-53, 4889-90), which are substantially the same as the provisions of the Penal Code of 1841 on the same subject (Clay's Digest, pp. 450-60), no defense or objection to an indictment can be entertained, assailing the regularity of the selecting, drawing, or summoning of the grand jurors by whom it was found, or the qualifications of those jurors, *except* that they were not drawn in the presence of the officers designated by law; and that objection must be taken by plea in abatement, filed at the term during which the indictment was found. These provisions were judicially construed in the cases of *Brooks v. The State*, 9 Ala. 9, and *Boulo v. The State*, 51 Ala. 18; and this court adheres to the construction then given to them.

2. *Same.*—These statutory provisions, and these judicial decisions, relate only to objections founded on any informality or irregularity in the conduct of the officers who are by law charged with the duty of drawing and summoning grand jurors, and do not apply to the action of the court in supplying deficiencies in the number of jurors, or other matter of record in the organization of the jury by the court. As to these matters, the court must act within its statutory powers, and its disregard of statutory provisions is fatal to an indictment.

3. *Same; number of grand jurors.*—If eighteen persons are drawn and sum-

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moned as grand jurors, as required by law, and three of them fail to appear, or, appearing, are excused, the grand jury should be organized with the remaining fifteen (Code, § 4753), and the court has no power to add to that number. If others are added, the grand jury is organized without authority of law, and all indictments found by it are vicious; but, while no valid conviction can be had under such indictment, the defect will not avail when presented collaterally. (Explaining and limiting *Finley v. The State*, 61 Ala. 201.)

4. *Same.*—If the grand jurors are drawn and selected by the proper officers, not from the list of householders and freeholders, as required by the statute (Code, § 4733), but from the list of registered voters, this is a mere irregularity, and furnishes no ground for reversing a judgment of conviction under an indictment found by such grand jury.

5. *Self-defense*—To make out a case of justifiable self-defense, the evidence must show that the difficulty was not provoked or encouraged by the defendant; that he was, or appeared to be, so menaced at the time as to create a reasonable apprehension of danger to his life, or of grievous bodily harm, and that there was no other reasonable hope of escape from such present impending peril.

FROM the Circuit Court of Hale.

Tried before the Hon. GEO. H. CRAIG.

The prisoner in this case was indicted for an assault on Enoch Jemison with a knife, with intent to murder him. No objection was raised to the indictment, so far as the record discloses, either by plea in abatement, demurrer, or motion in arrest of judgment; and the trial was had on issue joined on the plea of not guilty. The record shows, however, that the grand jurors, by whom the indictment was found, were drawn and selected from the list of registered voters of the county, instead of the list of householders and freeholders; and this irregularity is here urged as error.

The evidence adduced on the trial, as set out in the bill of exceptions, showed that the defendant and said Enoch Jemison were both freedmen, and that the difficulty between them occurred at a dance, or "frolic," among the negroes on the plantation of Col. Lewis in said county. Jemison, on whom the alleged assault was made, had pulled off his shoes to dance, and could not find them when he quit dancing. Some one told him that Abe Cross, the prisoner, had taken them, or had hidden them; but the prisoner denied this, when asked for them; and an altercation thereupon took place between him and Jemison about the shoes, when one of the other freedmen present interfered, saying that Major Lewis would not allow any fuss on his place. The parties then went out of the house, but not together, nor at the same time. Jemison went to the wood-pile, and picked up a stick of wood, five or six feet long, and as thick as a man's arm; and when the prisoner came towards him, struck at him several times, but did not hit him. Other persons again interfered, and made Jemison go into the house, while the prisoner remained outside, talking and using threatening language.

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In a few minutes Jamison again came out of the door, holding a chair in his hand (as some of the witnesses testified), and threatening to strike the prisoner with it, who rushed up, and cut him in the side with his knife. As to the details of the rencontre, however, the testimony of the several witnesses was conflicting; and as no question was raised on the evidence, it is not necessary to state it at length.

"This being all the evidence, in substance, the court thereupon charged the jury; and after such main charge, the defendant requested the court to charge the jury, in writing, as follows: '1. If the jury believe, from the evidence, that the assault was made by the defendant upon Enoch Jamison (if any was made), in the sudden heat of passion, and unprovoked by any previous assault made by the defendant, or other provocation given by him, and without malice, then the defendant can not be convicted of an assault with the intent to commit murder.' 2. 'If the jury believe, from the evidence, that the defendant had a reasonable apprehension of loss of his life, or of great bodily harm, at the time the alleged assault was made (if any was made), then he is not guilty of any offense, and the jury should return a verdict of not guilty.'" The court refused each of these charges, and the defendant excepted to their refusal; and these are the only rulings to which exceptions were reserved.

THOS. R. ROULHAC, for the prisoner. (No brief on file.)

H. C. TOMPKINS, Attorney-General, for the State, cited the following authorities: 1. As to the validity of the indictment, notwithstanding the irregularity in the drawing of the grand jury: Code, §§ 4759, 4889. 2. As to the charges refused: 1 Brickell's Digest, 339, §§ 59-63; *Tompkins v. The State*, 21 Ala. 569; *Miller v. Garrett*, 5 Ala. 96; *Tillman v. Chadwick*, 37 Ala. 317; *Eiland v. The State*, 52 Ala. 322; *Oliver v. The State*, 17 Ala. 587; *Noles v. The State*, 26 Ala. 31.

STONE, J.—The rules for the formation of grand and petit juries in this State, are prescribed in chapter 7, title 3, part 5, commencing with section 4732, of the Code of 1876. That section makes it the duty of the sheriff to obtain biennially a list of all the householders and freeholders residing in his county, from which list must be selected the names of such persons as may be thought competent to discharge the duties of grand and petit jurors. Section 4733 declares, that the sheriff, judge of probate, and clerk of the Circuit or City Court, or any two of them, shall select from said list the names of such persons as, in their opinion, are competent to

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discharge the duties of grand and petit jurors with honesty, impartiality, and intelligence, and are esteemed in the community for their integrity, fair character, and sound judgment; and by section 4736, a list of the persons thus selected is required to be filed in the office of the judge of probate. Section 4738 prescribes when and by whom the grand and petit juries shall be drawn, to serve at any regular term of the court. The persons charged with this duty are the judge of probate, sheriff, and the clerk of the Circuit or City Court, or a majority of them. Section 4740 prescribes the manner of the drawing, and directs that "the minutes of the drawing must then be signed by the officers present, and filed in the office of the judge of probate." Section 4744 requires the clerk to issue the proper *venire*, and section 4745 makes it the duty of the sheriff to summon the jurors thus drawn. Section 4759 declares, "The provisions of this article" [all the foregoing, and many details] "in relation to the selection, drawing, and summoning of jurors, are merely directory; and juries selected, drawn and summoned, whether at an earlier or later day, must be deemed legal, and possess the power to perform all the duties belonging to grand and petit juries respectively." Section 4889 of the Code declares, that "no objection can be taken to an indictment, by plea in abatement or otherwise, on the ground that any member of the grand jury was not legally qualified, or that the grand jurors were not legally drawn or summoned, or on any other ground going to the formation of the grand jury, *except* that the jurors were not drawn in the presence of the officers designated by law." Section 4890: "A plea to an indictment, on the ground that the grand jurors by whom it was found were not drawn in the presence of the officers designated by law, must be filed at the term at which the indictment is found."

Before the enactment of the statutes summarized above, it could be objected to the validity of an indictment, that the grand jury by which it was found had not been selected and summoned as required by law; that one of the grand jury was not a qualified juror, or that the grand jury were not drawn, selected, summoned and impaneled as required by law. Any of these irregularities furnished matter for plea in abatement.—*The State v. Clarkson*, 3 Ala. 378; 2 Brick Dig. 174, §§ 177, 179. Thus stood the law in this State, until the Penal (or penitentiary) Code of 1841 was enacted. By that code, the statutes on the subject were framed substantially as given above.

In *Brooks' case*, 9 Ala. 9, our present statutory system was brought in review before this court. After speaking of the

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select class from which juries were to be drawn, this court in that case said: "The selection of this class of individuals is confided to a board, composed of the clerk and officers of the county," &c. . . . "The board thus constituted is required to perform its duties in a particular manner, but is entirely independent of any supervision or control. Its action, by the eighth paragraph of the ninth section, is to be ascertained and made known by means of the certificate of the officers who compose it. When this certificate is made, its functions cease for the time, and there seems to be no mode by which its action upon the matters confided to it can be collaterally called in question, or re-examined. The jurors then selected are ascertained from the certificate of the board, which, in effect, is the same as a commission emanating from a proper source. It is not a question now to decide, whether fraud, mistakes, or irregularities, committed by this board, can not be inquired into, and its action set aside by the court, previous to the organization of the grand jury, even though the proper certificate may be produced; but we think no such inquiry can be made at the instance of one indicted, so as to affect the prosecution. The jurors, when once selected and certified, seem to stand in the same condition as any other *de facto* functionaries, whose acts will not be vitiated, although they may afterwards be set aside, as having no right in the first instance to exercise the function. . . . It is further urged, that the 39th and 51st sections recognize and permit the challenge of the panel and array, both of the grand and petit juries; also, that a plea in abatement is proper, either to the array of the grand jury, or to the disqualification of any member of it. There is no question of this; but the challenge to the array, or a plea in abatement to the panel, involves the inquiry only, whether the jury has been selected in the manner directed by the several sections of this chapter. Upon such an issue, the certificate of the officers, as provided by the eighth paragraph of the ninth section, is conclusive."

In the formation of the grand jury which preferred the indictment in the case from which we have been copying, there was not a sufficient number of the persons selected, drawn and summoned, to meet the requirements of the statute. Other persons were thereupon summoned, from whom enough were selected to complete the grand jury. Under what order summoned, or how selected, the report of that case does not inform us. One of the pleas in abatement to the indictment was as follows: "That R. L. W., one of the grand jurors, &c., was not one of the jurors selected from the list of freeholders and householders, and summoned by the sheriff, nor

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was his name contained in the *venire facias* returned into court; nor was he summoned, and his name drawn, in pursuance of any order of the court, made in consequence of the absence of any of the jurors mentioned in the *venire facias*." Another of the pleas in abatement is as follows: "That no selection of persons qualified to serve as grand jurors was made, as required by law, from the list of freeholders and householders of said county of Mobile, obtained by the sheriff of Mobile county." There was a demurrer to these pleas, which the Circuit Court sustained. This court affirmed the judgment of the Circuit Court, and held that the demurrer was rightly sustained to those pleas.

The case from which we have quoted so largely, was brought to this court soon after the adoption of the Penal Code of 1841, and was decided in 1845. We think it must be regarded and treated as a sound and wise exposition of a new system, which was intended to put an end to most of the technical objections, which had theretofore embarrassed criminal prosecutions; and to reduce the administration of the criminal law, as far as constitutional limitations would allow, to a trial on the merits. This is the view taken of our statutory system on the subject, in the case of *Boulo v. The State*, 51 Ala. 18. That case simply affirms what sections 4759 and 4889 of the Code declare—that a plea in abatement of an indictment, that any one or more of the grand jurors by whom it is found is incompetent, or disqualified, or that there was any irregularity in the drawing of the grand jury, is fatally defective, unless it shows that the jurors were not "drawn in the presence of the officers designated by law." We think this doctrine must be adhered to, and maintained with a firm hand. It results that, under no circumstances, will a defense to an indictment be entertained, which assails the regularity of the selecting, drawing, or summoning of the grand jury by which it was found, or the time when these several acts were performed, or which asserts that any member of the grand jury was not legally qualified, or which urges any other ground, going to the formation of the grand jury; with the single exception, that it is a good defense, if interposed in time, that the grand jurors were not drawn in the presence of the officers designated by law.—Code, § 4890.

As we shall hereafter show, the foregoing principles and rulings relate to the selection, drawing, summoning and organization of the grand jury—those drawn before court, and summoned—as provided for in sections 4732 to 4753, inclusive, of the Code of 1876. Section 4753 declares, that "at least fifteen persons must be sworn on the grand jury;" and the next section provides, that "if fifteen persons, duly quali-

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fied to serve as grand jurors, do not appear; or, if the number of those who appear is reduced below fifteen, by reason of discharges, or excuses allowed by the court, or by any other cause, the court must cause an order to be entered on the minutes, commanding the sheriff to summon, from the qualified citizens of the county, twice the number of persons required to complete the grand jury; . . . and from them must be drawn, under the direction of the court, a sufficient number of names to complete the grand jury." In this proceeding, unlike the selection, drawing and summoning of the grand jury for the term, as shown in the *venire*, the presiding judge is an important actor, and the necessity, as well as the manner of its doing, is made matter of record in the court organizing the jury, and becomes a part of the caption of each and every indictment the body may prefer. While sections 4889 and 4890 evidently apply, as far as they go, to the jurors thus summoned, drawn, and sworn, errors committed by the presiding judge in thus supplying deficiencies in the number required to complete the grand jury, being matter of record, are inquirable into in this court, when the case comes properly before us on questions reserved, or on writ of error. Code of 1876, § 4990.

The system provided for selecting, drawing and summoning, in the first instance, the eighteen freeholders or householders, from whom the grand jury must be formed, if fifteen persons remain and are present, after passing on disqualifications and excuses, is wisely framed and hedged about, so as to render it difficult for fraud, partiality or corrupt influences to enter into the constitution of this indispensable agency in the administration of the criminal law. Hence, the legal presumption arises of its lawful and rightful constitution, as provided in sections 4759 and 4889 of the Code of 1876. When the action of the court is invoked to supply deficiencies, the same safeguards are not provided. This statutory power of the court is not called into exercise, unless the precise state of case arises for which section 4754 makes provision, namely: that fifteen persons duly qualified to serve as grand jurors do not appear, or that the number of those who appear is reduced below fifteen by reason of discharges or excuses allowed by the court, or by some other cause. Till this condition of things occurs (and the record must show it), there is no deficiency in numbers, and the court is without power to order the summons of other jurors. So, we have held, that if fifteen qualified jurors remain present, after allowing proper excuses, the court can not add other jurors, and thus swell the number above fifteen; and this court reversed a conviction had on an indictment found

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by a grand jury thus augmented above the number of fifteen. This was an error apparent on the record of conviction, and it was our duty to notice it.—Code, § 4990. In like manner, we reversed a conviction, because the presiding judge, in ordering jurors to be summoned to supply a deficiency in the requisite number of fifteen, directed the sheriff to summon them “from the bystanders present in court;” and the grand jury was thus organized. And when the presiding judge, of his own motion, quashed the regular *venire* of the grand jury, because, in his opinion, some of the persons whose names appeared upon it, had violated a statute of the State creating a misdemeanor, or had encouraged its violation, and had thereupon ordered the sheriff to summon other persons, from whom the grand jury was organized, who found the indictment under which the defendant was convicted, this court reversed the judgment of conviction.—*Berry v. The State*, at present term; *Finley v. The State*, 61 Ala. 201; *O’Byrnes v. The State*, 51 Ala. 25. In each of these cases, the primary court had proceeded without any warrant in the statute; and while it was not intended to impute improper motives to the action of the courts in the several cases, the departure was too patent, and too liable to lead to abuse, for this court to sustain it, and thus make it a precedent. But, it was not our intention to overturn or weaken the authority of *Brooks’ case*, 9 Ala. 9, or *Boulo’s case*, 51 Ala. 18. We distinguished between the action of the board the law creates, in selecting and drawing the regular panel of the grand jury, and the order of the court, in directing the summons of persons to fill up a deficiency. The latter, as we have said, is part of the record caption of each indictment the grand jury may find.—1 Brick. Dig. 497, § 695.

In the case of *Finley v. The State*, 61 Ala. 201, it was our intention to declare, in emphatic language, that the Circuit Court had committed a reversible error, in requiring persons needed to make up a deficiency in the grand jury, to be summoned from “the bystanders present in the court.” Hence, we reversed and remanded the cause, and ordered the accused to be kept in custody, until discharged by due course of law. We employed very earnest, perhaps fervid language, in expressing our disapproval of the course which had been pursued in the court below, while we did not intend to question the purity of motive which prompted the act. Arguments since made before us, and an attempted use of that case, convince us that its scope and purpose have been misunderstood; or, perhaps, in expressing our disapproval of the course pursued, and our apprehension of the abuse to which it might lead, we may not have sufficiently guarded

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and qualified our expressions. We do not hold that that case stood before us as if no indictment of any description had been preferred. Our purpose was to declare that, under an indictment found by a body constituted as that was, no valid conviction could be had. If our language admits of a larger meaning than this, we hereby qualify it. Such a defect as that commented on in *Finley's case* will not avail, when presented collaterally.

In the present record it is shown, that the names composing the *venire* for the grand jury were drawn from the registered voters, and not from the selected list of householders and freeholders of the county, as directed by sections 4732, 4733, and 4738, of the Code of 1876. This is no ground for reversing the judgment of conviction.—Code, §§ 4759, 4889; *Brooks' case*, 9 Ala. 9; *Boulo's case*, 51 Ala. 18.

In the refusal of the court to give the charges requested by the defendant there is no error. The first was calculated to mislead, and was rightly refused on that account,—1 Brick. Dig. 339, §§ 59, 61. The second charge does not state enough to show a case of justifiable self-defense. To bring the case within that rule, it was necessary that the difficulty should not have been provoked or encouraged by the defendant; that he was, at the time, so menaced, or appeared to be so menaced, as to create a reasonable apprehension of the loss of his life, or that he would suffer grievous bodily harm, and that there was no other reasonable mode of escape from such present impending peril. In the case of *Mitchell v. The State*, 60 Ala. 26, we said: "When the fatal blow is given in consequence of passion suddenly engendered by a blow given, or which apparently is about to be given, then another inquiry arises: is the blow given, or about to be given, calculated to produce death, or grievous bodily harm? If it is, and the person assaulted has not brought on the difficulty for the purpose, and if he can not otherwise escape the danger, he may strike in self-defense." See, also, *Judge v. The State*, 58 Ala. 406, and authorities on the brief of the Attorney-General. The charge asked is wanting in several of the ingredients of justifiable self-defense, and was rightly refused.

Affirmed.

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Walker v. The State.

Indictment for Burglary.

1. *What is sufficient breaking and entering.*—A person who, with the intent to steal shelled corn, heaped up in a crib on the floor, bores a hole through the floor, through which the loose corn runs down into his sack below, is guilty of burglary (Code, § 4343) : the use of the auger in such case, with the intent to steal the corn, and effecting that purpose, constitutes both the breaking and the entry which are necessary elements of the offense.

FROM the City Court of Selma.

Tried before the Hon. JONA. HARALSON.

The prisoner in this case was indicted and convicted of burglary, in breaking and entering the corn-crib of N. Woodruff and R. R. Peeples. The case is brought up on bill of exceptions reserved during the trial. All the material facts are stated in the opinion of the court.

No counsel appeared for the prisoner in this court, so far as the record and dockets show ; and there is no brief on file.

H. C. TOMPKINS, Attorney-General, for the State, cited *McCall v. The State*, 4 Ala. 643 ; 2 Wharton's Amer. Cr. Law, §§ 1550-51 ; 2 East's Crown Law, 490 ; 1 Hale's P. C. (ed. 1847) 555.

BRICKELL, C. J.—The statute (Code of 1876, § 4343) provides, that “any person who, either in the night or day time, with intent to steal, or to commit a felony, breaks into and enters a dwelling-house, or any building, structure or inclosure within the curtilage of a dwelling-house, though not forming a part thereof, or into any shop, store, warehouse, or other building, structure or inclosure in which any goods, merchandise, or other valuable thing is kept for use, sale, or deposit, *provided* such structure, other than a shop, store, ware-house or building, is specially constructed or made to keep such goods, merchandise, or other valuable thing, is guilty of burglary,” &c.

The defendant was indicted for breaking into and entering “a corn-crib of Noadiah Woodruff and Robert R. Peeples, a building in which corn, a thing of value, was at the time kept for use, sale, or deposit, with intent to steal,” &c. He was convicted ; and the case is now presented on exceptions

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taken to instructions given, and the refusal of instructions requested, as to what facts will constitute a breaking into and entry, material constituents of the offense charged in the indictment. The facts, on which the instructions were founded, are : that in the crib was a quantity of shelled corn, piled on the floor ; in April, or May, 1878, the crib had been broken into, and corn taken therefrom, without the consent of the owners, who had the crib watched ; and thereafter the defendant was caught under it, and, on coming out, voluntarily confessed that, about three weeks before, he had taken a large auger, and, going under the crib, had bored a hole through the floor, from which the corn, being shelled, ran into a sack he held under it ; that he then got about three pecks of corn, and with a cob closed the hole. On these facts, the City Court was of opinion, and so instructed the jury, that there was such a breaking and entry of the crib, as would constitute the offense, and refused instructions requested asserting the converse of the proposition.

The material changes the statute has wrought as to the offense of burglary, as known and defined at common law, are as to the time and place of its commission. An *intent to steal*, or to commit a felony, are the words of the statute, while an intent to commit a felony were the words of the common law. Under our statutes, a felony is defined as a public offense, punished by death, or by imprisonment in the penitentiary ; while public offenses otherwise punishable are misdemeanors. The larceny of other than personal property particularly enumerated, and under special circumstances, the property not exceeding the value of twenty-five dollars, is petit larceny, and a mere misdemeanor. The *intent to steal*, as an element of burglary, is therefore made the equivalent of an intent to commit a felony, though the value of the thing intended to be stolen may be less than twenty-five dollars, and its larceny a misdemeanor.

The statute employs the words, "*breaks into and enters ;*" and these are borrowed from the common-law definition of burglary. They must be received with the signification, and understood in the sense, given them at common law. "There must, in general," says Blackstone, "be an actual breaking, not a mere legal *clausum fregit* (by leaping over invisible ideal boundaries, which may constitute a civil trespass), but a substantial and forcible irruption." The degree of force or violence which may be used is not of importance—it may be very slight. The lifting the latch of a door ; the picking of a lock, or opening with a key ; the removal of a pane of glass, and, indeed, the displacement or unloosing of any fastening, which the owner has provided as a security to the

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house, is a breaking—an *actual* breaking—within the meaning of the term as employed in the definition of burglary at common law, and as it is employed in the statute. In *Hughes' case* (1 Leach, C. C., case 178), the prisoner had bored a hole with a *centre-bit*, through the panel of the house-door, near to one of the bolts by which it was fastened; and some pieces of the broken panel were found within-side the threshold of the door; but it did not appear that any instrument, except the point of the *centre-bit*, or that any part of the prisoner's body, had been within-side the house, or that the aperture made was large enough to admit a man's hand. The court were of opinion, that there was a sufficient *breaking*, but not such an *entry*, as would constitute the offense.

The boring the hole through the floor of the crib, was a sufficient breaking; but with it there must have been an entry. Proof of a breaking, though it may be with an intent to steal, or the intent to commit a felony, is proof of one only of the facts making up the offense, and is as insufficient as proof of an entry through an open door, without breaking. If the hand, or any part of the body, is intruded within the house, the entry is complete. The entry may also be completed by the intrusion of a tool, or instrument, within the house, though no part of the body be introduced. Thus, "if A. breaks the house of B. in the night time, with intent to steal goods, and breaks the window, and puts in his hand, or puts in a hook, or other engine, to reach out goods; or puts a pistol in at the window, with an intent to kill, though his hand be not within the window, this is burglary."—1 Hale, 555. When no part of the body is introduced—when the only entry is of a tool, or instrument, introduced by the force and agency of the party accused, the inquiry is, whether the tool or instrument was employed solely for the purpose of *breaking*, and thereby effecting an *entry*; or whether it was employed not only to *break and enter*, but also to aid in the consummation of the criminal intent, and its capacity to aid in such consummation. Until there is a *breaking and entry*, the offense is not consummated. The offense rests largely in intention; and though there may be sufficient evidence of an attempt to commit it, which, of itself, is a crime, the attempt may be abandoned—of it there may be repentance, before the consummation of the offense intended. The *breaking* may be at one time, and the *entry* at another. The *breaking* may be complete, and yet an *entry* never effected. From whatever cause an *entry* is not effected, burglary has not been committed. When one instrument is employed to *break*, and is without capacity to aid otherwise than by opening a way of *entry*, and another instrument must be used, or

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the instrument used in the breaking must be used in some other way or manner to consummate the criminal intent, the intrusion of the instrument is not, of itself, an *entry*. But when, as in this case, the instrument is employed, not only to *break*, but to effect the only *entry* contemplated, and necessary to the consummation of the criminal intent; when it is intruded within the house, *breaking* it, effecting an *entry*, enabling the person introducing it to consummate his intent, the offense is complete. The instrument was employed, not only for the purpose of *breaking* the house, but to effect the larceny intended. When it was intruded into the crib, the burglar acquired dominion over the corn intended to be stolen. Such dominion did not require any other act on his part. When the auger was withdrawn from the aperture made with it, the corn ran into the sack he used in its asportation. There was a *breaking* and *entry*, enabling him to effect his criminal intent, without the use of any other means, and this satisfies the requirements of the law.

Let the judgment be affirmed.

Carter v. The State.

Indictment for Carnal Abuse of Female Child.

1. *Competency of child as witness.*—The admissibility of children as witnesses depends, not merely upon their possessing a competent degree of understanding, but also, in part, upon their having received such a degree of religious instruction as not to be ignorant of the nature of an oath, or of the consequences of falsehood.

2. *Same; preliminary examination.*—When a child of tender years is produced as a witness in court, it is the duty of the presiding judge to examine him or her, without the interference of counsel further than the judge may choose to allow, in regard to the obligation of the oath taken by a witness; and, in a proper case, to explain the same to one who is intelligent enough to understand what he says; and then to determine whether or not the child shall be sworn and permitted to testify.

3. *Same.*—*Held*, in this case, that a little negro girl, about nine years old, was improperly permitted to testify as a witness, when the only evidence as to her competency was, that in answer to questions put to her by defendant's counsel, she said, "that she did not know what the Bible was; had never been to church but once, and that was to her mother's funeral; did not know what book it was she laid her hand on when sworn; had heard tell of God, but did not know who it was; and said, if she swore to a lie, she would be put in jail, but did not know she would be punished in any other way."

FROM the Circuit Court of Butler.

Tried before the Hon. JOHN K. HENRY.

The defendant in this case was tried and convicted under
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an indictment which charged, that he "did carnally know, or abuse in the attempt to carnally know, Mary Godwin, a female under the age of ten years." On his trial, he reserved a bill of exceptions to several rulings of the court; one of which was the admission of the child, Mary Godwin, as a witness, against his objection, under the facts stated in the bill of exceptions, which are also stated in the opinion of the court.

No counsel appeared in this court for the prisoner, so far as the record and dockets show; and there is no brief on file.

H. C. TOMPKINS, Attorney-General, for the State.

MANNING, J.—The rule insisted on in all the books is, that "the admissibility of children as witnesses depends, not merely upon their possessing a competent degree of understanding, but also, in part, upon their having received such a degree of religious instruction as not to be ignorant of the nature of an oath, or of the consequences of falsehood." 1 Phillipps on Ev., 4th Amer. Ed. with Cowen & Hill's notes, 11, 12. In *Rex v. Williams* (7 Car. & P. 320), a child eight years old, who, up to the time of the event of which she was to testify, had received no religious training, nor had ever heard of God, or of future rewards and punishments, and had never prayed; and who, in the interval (about sixteen weeks) between that time and the trial, had been twice visited and instructed by a clergyman, as to the nature and obligation of an oath, but still appeared manifestly to have no real understanding on the subject of religion, or a future state, was not permitted to testify. In Massachusetts, it was said, in 1813, that by the later opinions it was the settled law at that time, "if an infant appear, on examination by the court, to possess a sufficient sense of the wickedness and danger of false-swearing, he may be sworn, although of ever so tender an age. The credit of the witness . . . is to be judged of by the jury, from the manner of his testimony, and other circumstances."—*Comm. v. Hutchinson*, 10 Mass. 225.

If, after the event of which he is to testify, a child, previously ignorant, is by instruction made to understand the nature of the obligation to speak the truth which is imposed by an oath, he is then a competent witness. And it has been held, that the trial of a criminal cause may be postponed, when an important witness for the prosecution is a child, that he or she may in the meantime receive such instruction. 1 Leach, 430, note; *Rex v. Nichols*, 2 C. & Kirw. 246. But

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disapprobation of such a practice has been expressed by other judges. In Cowen & Hill's notes to Phillipps on Evidence, *supra*, the case of one *Jenner* is cited, in which a girl nine years old, very intelligent, but ignorant of the nature of an oath, and of the moral penalty of false-swearing, was instructed by the judge on the spot, and then sworn.—1 Vol. 11, note 8. And so essential is it to the repression of crime, that the public shall not, in all cases, be deprived of the testimony of those, however low in the scale of civilization, who have memory and intelligence enough to relate what they have seen and know, that formerly a statute of this State made it the duty of the presiding judge, whenever a negro slave was a witness, "to explain to him or her the nature of the oath to be administered, and to state to him or her the punishment for swearing falsely;" it being assumed that such instruction would be sufficient to qualify those most ignorant in these particulars, who were not deficient of mind, to be sworn and give evidence to be considered by the jury. Clay's Dig. 473, § 9.

When, however, a child of tender years is produced as a witness, it is the duty of the presiding judge to examine him or her, without the interference of counsel further than the judge may choose to allow, in regard to the obligation of the witness' oath; and, in proper cases, to explain the same to one intelligent enough to comprehend what he says; and then to determine whether or not such child shall be sworn and permitted to testify.

In this case, an examination that seems to us to have been inadequate, was had. The witness was a little negro-girl, about nine years old; and to questions put by counsel for defendant, she "answered, that she did not know what the Bible was; had never been to church but once, and that was to her mother's funeral; did not know what book it was she laid her hand on when sworn; had heard tell of God, but did not know who it was; and said, if she swore to a lie, she would be put in jail, but did not know she would be punished in any other way." This is all the record contains on this subject. And thereupon the judge, without more, permitted her to be sworn and give evidence. Seeing how fully her testimony was corroborated, and the apparent artlessness with which it was given, the jury probably yielded entire credence to what she said; and we regret we cannot permit the verdict and judgment to stand. But it is obvious that, according to the rules of evidence which courts are bound by, the answers elicited from the witness did not show her to be competent. Counsel for defendant obtained from her just so much as tended to confirm the contrary

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conclusion, and there the examination was permitted to stop, when probably a few questions, put with the design to enable the formation of an impartial judgment, would have disclosed either that she had a sufficient sense of the wickedness and danger of swearing falsely, or sufficient intelligence to understand instructions on the subject, which the judge might then have given.

Under the rule, and upon the evidence, we are constrained to hold that the circuit judge erred in permitting this witness to be sworn and testify, and that the judgment must be, therefore, reversed, and the cause remanded. Let the defendant be kept in custody, until discharged by due course of law.

Smith v. The State.

Indictment for Disturbing Females at Public Assemblage by Rude Behavior, &c.

1. *Statutory indictments.*—This court has repeatedly held, that in framing indictments on statutes which create new offenses, and describe their constituents, it is sufficient to follow the language of the statute, or to describe the offense in other words of equivalent import; and has uniformly sustained the sufficiency of the forms of indictment prescribed by the Code, though with doubt and hesitation in some extreme cases. But, when an indictment neither pursues the words of the statute creating the offense, nor follows the prescribed form, it must aver every material constituent of the offense (except the venue and time), or it will be held insufficient.

2. *Same; in this case, for disturbing females at public assembly.*—An indictment which charges, that the defendants, “by rude and indecent behavior, or by profane or obscene language, willfully disturbed females, members of the society called,” &c., “at the Fair Grounds in or near the city of Montgomery, met for the purpose of instruction, amusement, or recreation,” is insufficient, and fatally defective. It does not conform to the language of the statute creating the offense (Code, § 4200), for want of an averment that the females were met in “public assembly;” nor to that of the statute prescribing the form of indictment (§ 4814), for want of an averment that there was an “assemblage” of people, composed in whole or in part of the females.

ERROR to the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The indictment in this case contained but a single count, which charged that Scott Smith and Edward Watts, “by rude and indecent behavior, or by profane or obscene language, willfully disturbed females, members of the society called ‘Daughters and Sons of St. Luke of the ancient, grand, united order of St. Paul,’ at the Fair grounds in or near the

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city of Montgomery, met for the purpose of instruction, amusement, or recreation; against the peace," &c. Scott Smith, being on trial alone, was found guilty, and fined twenty dollars. He afterwards moved in arrest of judgment, on account of the insufficiency of the indictment, but his motion was overruled; and this is now urged as error.

J. GINDRAT WINTER, for the defendant.

F. S. FERGUSON, with the Attorney-General, for the State.

STONE, J.—The defendant in this case was indicted under section 4200 of the Code of 1876, which makes it a misdemeanor in "any person who, by rude and indecent behavior, or by profane or obscene language, willfully disturbs any female or females in any public assembly, met for the purpose of instruction, amusement, or recreation." There are other provisions of the statute not presented by this record. The offense denounced by this statute consists of several ingredients. The first is, that the disturbance must be by "rude and indecent behavior," or by "profane or obscene language." The second is, that the female or females disturbed must be in "public assembly." The third is, that such females must have "met for the purpose of instruction, amusement, or recreation." If any one of these ingredients be wanting, the offense under this statute is not complete. 1 Brick. Dig. 499, § 735. There are other sections of the Code which provide punishment for offenses similar to this, but they shed no light on this case,—Code of 1876, §§ 4199, 4201, 4203.

Viewing the indictment in this case without reference to section 4814 of the Code (to be noticed hereafter), it omits to charge that the females disturbed were met *in public assembly*. It charges that the disturbance was of females "at the Fair Grounds in or near the city of Montgomery, met for the purpose of instruction, amusement, or recreation." Inasmuch as there may be a place or places at the "Fair Grounds" not public, this charge can not be regarded as the equivalent of the words of the statute, "in public assembly." Section 4814 of the Code declares, "In an indictment for disturbing the females in any public assembly, under section 4200, it is sufficient to charge that the defendant willfully disturbed an assemblage of people, composed in whole or in part of females, by rude or indecent behavior, or by profane or obscene language." It will be seen that this dispenses with the averment in section 4200, that the assembly is *public*, and it equally dispenses with all averment of the purpose

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for which the females have assembled. It does not dispense with the averment that there was an *assemblage* of people, composed in whole or in part of females, for the disturbance of which the indictment is preferred.

We have uniformly held, and in some cases that were extreme, that when the legislature, either in the body of a statute, or in a furnished form, has declared what shall be a sufficient indictment, such legislative direction is controlling, and an indictment following such form will be pronounced good.—*Wilson v. The State*, 61 Ala. 151; 1 Brick. Dig. 499, § 734; *McCullough v. The State*, at the present term. The language of the present indictment is, that the defendants, “by rude and indecent behavior, or by profane or obscene language, willfully disturbed females, members of the society” [naming it], “at the Fair grounds, in or near the city of Montgomery, met for the purpose of instruction, amusement, or recreation.” Now, it will be observed, that this indictment contains every averment to make it good under section 4200, except the charge that the females disturbed were in “public assembly.” It is thus shown that the indictment was framed under that section, but is defective under it. It does not purport to follow section 4814, for its phraseology is entirely different. It may be contended that it avers substantially the same facts as are declared sufficient in that section, and that on that account we should adjudge it sufficient. This court has repeatedly held that, in framing indictments on statutes, creating new offenses, and describing their constituents, it is sufficient to follow the language of the statute, or to describe the offense in other words of equivalent import.—Code of 1876, § 4792; 1 Brick. Dig. 499, §§ 734–36. We are now asked to take a step further, and to hold that an indictment, which does not follow, or purport to follow, a form given, but avers, in language entirely different, every material fact contained in the form, must be adjudged sufficient, although both the form and the indictment omit material constituents of the offense.

Applying the rule invoked to the present case, the form given in section 4814 omits two essential constituents of the statutory offense—namely, that the assemblage was *public*, and the *purpose* for which the females had assembled. The indictment omits the former of these constituents, but not the latter. Under our rulings, we have held the forms sufficient, because the legislature has so declared. This we have maintained, and could only maintain, on the theory that the form provided is declared by the legislature to contain an averment, express or implied, of every constituent of the offense. It does not lessen the proof necessary to a convic-

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tion. Each constituent of the offense must be proved, although only implied in the brief language of the indictment. Hence, to justify a conviction under section 4200 of the Code, it is necessary to prove that the offense was committed in Montgomery county, within twelve months before the commencement of the prosecution, and that the females were in public assembly, met for the purpose of instruction, amusement, or recreation. These constituent elements, by a declaration of the legislative will, an indictment framed according to section 4814 of the Code must be understood as charging, although, in fact, it expresses neither of these. If the testimony fails to establish either one of these elements of the offense, the defendant is entitled to an acquittal. We do not feel at liberty to extend the principle heretofore declared. It has been with much doubt and hesitation that some of the brief forms of indictments found in the Code have been held a sufficient compliance with the constitution. Declaration of Rights, sections 7, 8. Still, we have held that the forms furnished are the forms prescribed by law, and that they contain the nature and cause of the accusation, because the legislature have so declared. There is no legislative edict that indictments, not following some given form, yet containing every material averment of fact which the form contains, but in different language, and in different form, shall be sufficient. An indictment "must state the facts constituting the offense."—Code of 1876, § 4785.

Section 4824 of the Code, after declaring that the forms given are sufficient "in all cases in which they are applicable," contains this clause: "Analogous forms may be used in other cases." Analogous to what? Many of the forms, though severely pruned in verbiage, nevertheless contain every constituent element of the offense charged. Others make no mention of material facts, going to make up the offense. Which class shall be followed, or adopted as the basis of the analogy? We think the only safe rule is to require that, when the indictment is not framed on any form given in the Code, it shall aver every material constituent of the offense; always excepting the statement of venue and of time.—Code of 1876, §§ 4787-8. The indictment in this case is insufficient.

The judgment of the City Court is reversed and annulled, and the cause remanded, that the indictment may be quashed. Let the accused remain in custody, until discharged by due course of law.

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Scott v. The State.

Indictment for Burglary.

1. *Organization of grand jury; objections to indictment, for defects or irregularities therein.*—In the completion and organization of the grand jury, when the number of persons originally drawn and summoned is from any cause reduced below fifteen, it is the duty of the court, by an order entered on the minutes, to direct the sheriff to summon twice the number of persons necessary to supply the deficiency, and to require them to be summoned, like the original *venire*, not from the registered voters of the county, but from the list of householders and freeholders (Code, §§ 4754, 4734); and when the record shows a violation of these statutory provisions by the court, a judgment of conviction, under an indictment found by a grand jury so organized, will be reversed on error.

ERROR to the Circuit Court of Perry.

Tried before the Hon. GEO. H. CRAIG.

The indictment in this case was found at a regular term of the late Court of Quarter Sessions of said county, and the cause was transferred, on the abolition of that court, into the Circuit Court. The opinion states the facts shown by the record, as to the organization of the grand jury by which the indictment was found. There was a demurrer to the indictment, but the record does not show the action of the court upon it. The trial was had on issue joined on the plea of not guilty. After conviction, the defendant moved in arrest of judgment, on the ground that the grand jury was not organized according to law, but the motion was overruled. The case is brought to this court on writ of error, awarded by MANNING, J.

KELLY & HOWZE, for the defendants.—The record shows that, in the organization of the grand jury, the court violated express statutory provisions, in two important particulars: 1st, in directing only five persons to be summoned, when at least eight were necessary—that is, twice the number necessary to make up the deficiency; 2d, in ordering them to be summoned from the list of registered voters, instead of the householders and freeholders.—Code, §§ 4733, 4754. These irregularities, being affirmatively shown by the record, were good matter in arrest of judgment, and they are fatal to a judgment of conviction.—*Brooks v. The State*, 9 Ala. 9; *O'Byrnes v. The State*, 51 Ala. 27; *Finley v. The State*, 61 Ala. 201.

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H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—A grand jury is a constituent element of a Circuit or City Court, or of a court clothed with criminal jurisdiction; and the statutes confer on particular officers the power and duty of drawing them, from lists of the householders and freeholders of the county. The court, except in particular cases the statute specifies, has no power to originate the jury.—*O'Byrnes v. The State*, 51 Ala. 25; *Finley v. The State*, 61 Ala. 201. It is apparent from the statutes, that the jury shall be composed of not more than eighteen, and not less than fifteen members. The officers charged with the duty are required to draw and select eighteen persons, and a *venire* issues to the sheriff, commanding him to summon them to appear and serve in that capacity, at the next term of the court. If fifteen of them do not appear, or if, from any cause, the number who do appear is reduced below fifteen, "the court must cause an order to be entered on the minutes, commanding the sheriff to summon, from the qualified citizens of the county, twice the number of persons required to complete the grand jury; which order the sheriff must forthwith execute, and the persons summoned are bound to appear presently, and, if necessary, to serve as grand jurors, under the same penalties as if they had been regularly drawn and summoned on the original list of grand jurors for the term; and of the persons so summoned, if a greater number appear than are necessary to complete the grand jury, the names must be written on separate slips of paper, which must be folded or rolled up, so that the name may not be visible, placed in a box, or some substitute therefor, and from them must be drawn, under the direction of the court, a sufficient number of names to complete the grand jury."—Code of 1876, § 4754.

In this case, as appears from the record, eighteen persons were drawn and selected to serve as grand jurors, and a *venire* was issued to the sheriff, commanding him to summon them, which was executed on all but one of them. But fourteen of them appeared, and of these, three were excused and discharged, leaving only eleven of those drawn and selected. The court thereupon made an order, directing the sheriff to summon immediately, "from among the registered voters of the county, having the other qualifications required by the statute, five persons, in order to complete said grand jury." In obedience to the order, the sheriff summoned five persons, who were sworn and impaneled; the court having first ascertained that they, with the persons drawn and sum-

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moned, who had appeared, and were not excused and discharged, had the requisite qualifications.

The court manifestly departed from the statute, in not requiring the sheriff to summon at least eight persons, four being the number necessary to complete the jury to its lowest number. There was, also, a departure, in limiting the sheriff to summoning registered voters, who had the necessary qualifications. Registration as a voter is not a qualification of a juror, grand or petit, and the courts are without power to prescribe it. These departures from the statute vitiate the findings of the body organized as a grand jury.—*O'Byrnes v. The State, supra*; *Finley v. The State, supra*.

The judgment of conviction must be reversed, and the cause will be remanded, that the accusation may be quashed; the prisoner must remain in custody, until discharged by due course of law.

Atwell v. The State.

Indictment for Selling Mortgaged Property.

1. *Sufficiency of indictment.*—An indictment, found before the Code of 1876 became operative, charging that the defendant “did remove, conceal, or sell one yoke of oxen, personal property, for the purpose of hindering, delaying, or defrauding C. C., who had a claim thereto under a written mortgage, with a knowledge of the existence of such mortgage,” is sufficient.

2. *Conclusion of indictment.*—When the State of Alabama is named in the caption of an indictment, it is sufficient if the indictment concludes “against the peace and dignity of the State,” without again naming it.

3. *Admissibility of defendant's declarations as evidence for him.*—The declarations of the defendant while negotiating a sale of the mortgaged property, to the effect that he had obtained the mortgagee's permission to sell, are not competent evidence for him when criminally prosecuted for making the sale.

4. *Declarations of witness out of court; when and how proved.*—The declarations of a witness who has been examined, as to any material matter about which he was not questioned, cannot be proved by another witness. The witness himself must be first interrogated as to such declarations.

5. *Selling or removing mortgaged property; constituents of offense, and relevancy of evidence in defense.*—A conviction cannot be had for selling or removing mortgaged property (Code, § 4353), unless the defendant sold or removed the property for the purpose of hindering, delaying, or defrauding the mortgagee. If he removed and sold it for the purpose of raising money to pay the mortgage debt, honestly believing that the mortgagee assented to such removal and sale, and having just cause so to believe, he is not guilty; and with a view of showing such a state of facts, having proved a conversation had with the mortgagee's agent, by whom the mortgage was taken, with reference to the proposed removal and sale, he should be allowed to prove facts tending to show the general authority exercised by the agent in and about the mortgagee's business, from which he might infer that the agent had authority to assent to such removal and sale, although the agent and his principal both deny such authority.

[Atwell v. The State.]

FROM the Circuit Court of Crenshaw.

Tried before the Hon. JOHN K. HENRY.

The indictment in this case was found in March, 1876, and contained two counts; the first count charging, that the defendant "did remove, conceal, or sell one yoke of oxen, personal property, for the purpose of hindering, delaying, or defrauding Calvin C. Colquitt, who had a claim thereto under a written mortgage, with a knowledge of the existence of such mortgage; against the peace and dignity of the State." Having been found "guilty as charged in the first count," the defendant moved in arrest of judgment, on the following grounds: 1st, "because the indictment is indefinite and uncertain;" 2d, "because the averments of the first count are in the alternative;" 3d, "because said count fails to show by whom said mortgage was executed;" 4th, "because it fails to aver that defendant had knowledge of the existence of said mortgage;" 5th, "because it fails to charge any indictable offense;" 6th, "because it fails to follow the language of the statute in describing the offense;" 7th, "because it fails to aver that the oxen were of any value." The court overruled the motion.

On the trial, as the bill of exceptions states, the State introduced in evidence the mortgage on the oxen; which was executed by the defendant and one Jesse Chandler, by their marks duly attested, was dated the 27th February, 1875, and was given to secure a debt for \$75 for advances to make a crop, which fell due on the 1st October, 1875. The mortgage conveyed, in addition to the yoke of oxen, a cow and calf, a mare, five head of cattle, and forty acres of land; and contained a clause in the usual language, authorizing the mortgagee to take possession and sell on default. "Alfred Colquitt, a witness for the State, testified, that he was employed by Calvin C. Colquitt, in the year 1875, as a clerk, and was in charge of his business of merchandising in Bullock, Crenshaw county, and as such clerk he filled out the said mortgage; that the oxen were included in the mortgage, and were present before said C. C. Colquitt's store at the time said mortgage was signed; that he made out several other mortgages for his said brother, but, in each case, submitted them to his brother's approval and assent; that in the fall of 1875 he met the defendant in the road, near Smithville, and that defendant stated to him that he wanted to sell the oxen to them, to pay the mortgage, as he would not be able to pay the mortgage. Witness replied, that they did not want them, and had no use for them. Defendant then stated, that he wanted to sell them to some one else; to which witness replied, that he supposed it would be all right, if they

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got their money—that all they wanted was their money. Witness further testified, that one Rhodes was present at the time; also, that he had no authority from C. C. Colquitt to give defendant permission to sell said oxen;” also, that after the law-day of the mortgage, he, as the agent of C. C. Colquitt, went to defendant’s house, which was in Crenshaw county, but did not find defendant at home, and did not find the oxen; that he ascertained the direction the defendant had gone, and followed after him, and found the oxen in the possession of one Charles Jones, in Conecuh county, about fifty miles from the defendant’s house; that he took possession of them, drove them back, and sold them under the mortgage; that the mortgage was still unsatisfied, and that the defendant “had never been to see them about it since the removal of said oxen.” Charles Jones, another witness for the State, was then introduced, and testified, “that he bought said oxen from the defendant, in the fall of the year 1875, at his house in Crenshaw county; that he had never seen defendant before; that he gave defendant, for the oxen, one ox, and promised to give him twenty dollars more, but had never done so. The defendant then proposed to prove by said Jones, that defendant told him, at the time of said trade, that said oxen were under mortgage to said C. C. Colquitt, but that he had permission to sell them.” The court excluded this evidence, on motion of the attorney for the State, and the defendant excepted.

“Calvin C. Colquitt testified, for the State, that all of said mortgage debt had not been paid. The State having here rested, the defendant introduced Jesse Chandler as a witness, who signed said mortgage with defendant, and who testified, that defendant went off to sell said oxen in the open daylight, about eight or nine o’clock in the morning, but went in an opposite direction from Colquitt’s; and he also stated, on cross-examination, that all of said debt was not paid. One Rhodes testified, for the defendant, that he heard the conversation between Alfred Colquitt and defendant near Smithville; and that defendant stated to him that, whenever he got tired of waiting for his money, to let him know, and that he would sell the oxen, as he could get more for them than he could by selling them under the mortgage; to which said Colquitt made no reply, that he remembers. The defendant then introduced one Deloach as a witness, who, being asked, testified that said Alfred Colquitt was in charge of said C. C. Colquitt’s business of merchandizing, during the year 1875, at Bullock in said county;” which statement was excluded by the court, on objection by the State, and the defendant excepted. “The defendant offered to prove by said witness,

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also, that he had heard said C. C. Colquitt say, in the fall of 1875, that said Alfred Colquitt had charge of his said business in Bullock, and that he had nothing to do with it;" but the court excluded this statement also, on objection by the State, and the defendant excepted. "The defendant proved also, by several witnesses, that his general character for veracity was good in his neighborhood. This was all the evidence in the case."

J. D. GARDNER, for the prisoner.

H. C. TOMPKINS, Attorney-General, for the State.

MANNING, J.—By the statute "to amend section 3705 (159) of the Revised Code," approved February 13th, 1875, it was enacted, that "any person who removes, conceals, or sells any personal property, for the purpose of hindering, delaying, or defrauding any person who has a claim thereto under any written instrument, lien created by law for rent or advances, or any other lawful or valid claim, verbal or written, with a knowledge of the existence thereof; or if any person or persons buy, receive, or conceal any such property, with such knowledge of the existence of any such claim, with like intent; upon conviction thereof, he or they shall be punished as though he or they had stolen the same."

Appellant was found guilty as charged in a count of the indictment, which alleged that he "did remove, conceal, or sell one yoke of oxen, personal property, for the purpose of hindering, delaying, or defrauding Calvin C. Colquitt, who had a claim thereto under a written mortgage, with a knowledge of the existence of such mortgage; against the peace and dignity of the State." The indictment was returned by the grand jury before the Code of 1876, in which the statute quoted was, with some alteration of the language, embodied, became the law of the State. And the accusation is made in the terms of the act, and in accordance with the form prescribed in the Revised Code of 1867, for the like offense denounced in section 3707 of that Code. In the Code of 1876, the form of the indictment is somewhat changed. The court did not err in overruling the motion in arrest of judgment. *Nixon v. The State*, 55 Ala. 120; *Glenn v. The State*, 60 Ala. 104.

2. To say in an indictment, entitled in the commencement The State of Alabama, that the offense it charged was committed "against the peace and dignity of the State," is equivalent to saying "against the peace and dignity of the State of Alabama."

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3. What the defendant said when he was negotiating a sale of the oxen, in regard to the permission to do so received from the mortgagor, was not admissible. If it were, any person, while intending to violate the law, might, in the act of doing so, make evidence by his declarations for his own defense.—*Nixon v. The State, supra.*

4. Nor did the circuit judge err in refusing to allow DeLoach to testify what he had heard Calvin C. Colquitt, the mortgagee of the oxen, say of Alfred Colquitt having charge of his business. Calvin Colquitt had himself been upon the stand as a witness, and was not interrogated about any such declaration. When a person, competent to testify, is present, and examined as a witness in a cause, his statement of what he has said, of any matter involved in it, must be heard, before a third person can be permitted to prove what he said. And, generally, his attention must be called to the time, place, and presence, when and in which the declarations to be proved are supposed to have been made.

5. But, was not defendant entitled to show that Alfred Colquitt, who took from him the mortgage to Calvin C. Colquitt, for advances to make a crop with, was openly acting, during the year 1875, as the apparent general agent of the latter between him and his customers? Alfred Colquitt had testified, that he was the clerk of Calvin C., "and was in charge of his business of merchandizing in Bullock, Crenshaw county, and as such clerk filled out the said mortgage," &c.; and that in the fall of 1875 (the mortgage debt being payable the 1st of October in that year), "he met defendant in the road, near Smithville," and was told by him that "he wanted to sell said oxen to *them*, to pay the mortgage, as he would not be able to pay it," except by a sale of property. To which said Alfred answered, "that *they* did not want them [the oxen], and had no use for them. Defendant then stated that he would sell them to some one else; to which witness [Alfred Colquitt] replied, that he supposed it would be all right, if *they* got *their* money." Another witness, who was present, testified, that defendant told Alfred Colquitt he wanted to sell the oxen, because he could get more for them than Colquitt could by selling under the mortgage. It was after this that defendant took the oxen into another county, and negotiated for a sale of them there; and Alfred Colquitt, following after, brought them back, and sold them under the mortgage at Bullock. Alfred Colquitt testified, at the trial of this cause, that he had no authority from Calvin C., to give permission to defendant to sell the oxen.

Now, unless defendant removed the oxen, or concealed or sold them, "for the purpose of hindering, delaying, or de-

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frauding Calvin C. Colquitt," he was not guilty of the offense he was charged with. The mortgage covered other property besides the oxen, to-wit, a cow and calf, a mare eleven years old, "five head" of other cattle, and forty acres of land; which latter defendant returned to, and lived on, after he had removed and sold the oxen. And if it was to save this property, or some of it, by paying the mortgage debt, wholly or in part, by the proceeds of the sale of the oxen, that he took them into another county to sell them, he ought to have been allowed to show that Alfred Colquitt was so apparently the general agent of Calvin C., that he, defendant, might in good faith suppose that, in all that the former did and said about the mortgage debt and property, and in all that was said to him about it, Alfred Colquitt represented and acted for Calvin C. Colquitt. The former used the plural number as if speaking for Calvin C., as well as himself.

"Defendant proved by several witnesses, that his general character for honesty was good in his neighborhood." Yet the jury may have supposed that, because Alfred Colquitt testified that he had no authority from Calvin C., to give permission to defendant to sell the oxen, defendant must be guilty, for having undertaken to do so. But, if the removal of the oxen out of the county was not made by the defendant for the purpose of hindering, delaying, or defrauding Calvin C. Colquitt, but to enable defendant to raise money to by or partially pay the mortgage debt, and he had just reasons for believing, and did believe, he had the consent of his mortgagee, through Alfred Colquitt, to dispose of them for that purpose, he should not be found guilty under the indictment in this cause. The evidence excluded was relevant, and may have been useful in establishing this defense.

Let the judgment be reversed, and the cause remanded.

Gray v. The State.

Indictment for Assault with Intent to Murder.

1. *Evidence of malice or intent.*—Under a prosecution for an assault with intent to murder, any evidence is admissible which tends to show malice, ill-will, or other motive for the act of the accused; and for this purpose, the fact of a former altercation or difficulty between the parties, but not the merits or details thereof, may be given in evidence.

2. *Assault; charge defining.*—A charge to the jury, in these words, "An

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assault is an attempt to strike, in striking distance, or shoot in shooting distance," construed with reference to the evidence in this case, is not erroneous.

3. *General exception to charge partly correct.*—A general exception to a charge, separable into two or more distinct propositions, will not avail, if any one of those propositions be correct.

4. *Asking defendant if he has anything to say in arrest of judgment; correcting judgment entry.*—When the judgment entry, in a case of felony, recites that the defendant was asked by the court if he had anything to say in bar or preclusion of judgment, the recital imports absolute verity, and testimony can not be received to impeach it; and motion being made to correct the entry in this particular, supported by affidavits, and overruled by the court on the evidence adduced, this court can not revise its ruling on bill of exceptions.

FROM the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The prisoner in this case was indicted for an assault on Spencer Brooks, with the intent to murder him, and went to trial on the plea of not guilty. On the trial, he reserved a bill of exceptions, in which the evidence adduced, and the several rulings of the court, are thus stated :

"The State introduced Spencer Brooks as a witness, who testified, that Matt Gray, the defendant, had been concerned in an assault on him with a knife, whereby he was severely cut in the neck, a short time before the assault charged in the indictment." To the introduction of this testimony the defendant objected, and moved to exclude the same from the jury; which motions, each, the court overruled, and the defendant excepted. "Said witness then testified, that as he was going to Mr. Mitchell's, to the defendant's trial for said assault, he heard the defendant say, 'One thing sure, if any body swears a lie on me to-day, I will go up on him;' and that this was on the same day of the assault for which the defendant is now indicted. To the introduction of this evidence, also, the defendant objected," and moved to exclude it from the jury; and he reserved exceptions to the overruling of this objection and motion. "The defendant then moved the court to exclude from the jury so much of the testimony of said witness as showed, or tended to show, any thing relating to the details of any difficulty between witness and the defendant, previous to the assault with which defendant now stands charged; which motion was overruled by the court, so far as the testimony here admitted is concerned," and the defendant excepted. "The witness then stated, that after the defendant's trial by said Mitchell, and after he (witness) had left Mitchell's, and gone some three or four hundred yards, defendant overtook him, and commenced firing on or at him with a pistol; that he threw up his right hand, and said, 'What is the matter, Matt? You have no right to shoot me;' that defendant then said, 'God damn you, I intend to kill you.' Witness said, that he was not hit by

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any of the three shots fired at him by the defendant, but heard the balls whistle by him; that defendant was about twelve or fifteen steps from him when he fired at him; that he ran after defendant had fired at him three times, and that all this occurred in Montgomery county, in the early part of the year 1879."

Abe Dorsey, another witness for the State, testified that, "on the day of the trial, he had left Mr. Mitchell's, with some others, ahead of the defendant, but Spencer Brooks was ahead of him; that the defendant, running, overtook and passed him and the others, going in the direction of Spencer Brooks, and having a pistol in his hand; that he (witness) ran after defendant, and caught up with him, just before he fired the first shot, and said to him, 'Dont shoot him, Matt,' that the defendant replied, 'I am only going to frighten him,' that defendant was laughing when he said this, and did not look mad; that he (witness), at the time of the first shot, was between defendant and said Brooks, and had hold of defendant; that the defendant fired these shots in the air, and above the head of said Brooks, and did not shoot directly at him; and that some one then told Brooks to run." Joseph A. Mitchell, another witness for the State, was then introduced, and testified, "that he was a justice of the peace in Montgomery county; that the defendant, some time in the spring of 1879, was a defendant to a charge, made against him by Spencer Brooks, of being accessory to an assault made on said Brooks with a knife. The defendant objected to the introduction of the evidence of this witness, as to the charge on which defendant was tried before him," and also moved to exclude the same from the jury; and he reserved exceptions to the overruling of this motion and objection. "The defendant then moved the court to exclude from the jury the evidence of said witness as to the charge on which defendant was tried before him," and also "all the evidence of said witness as to all matters connected with said trial, except showing the fact that a trial was had before him in which said defendant was a defendant." The court overruled the first motion, and the second also, "so far as it applies to the evidence admitted by the court;" to which rulings exceptions were reserved by the defendant. "The witness then testified, further, that after the trial of said cause, and after all the parties and witnesses had left his court-room, except the defendant and one Gilmer, who was acting as constable, defendant said, speaking of Spencer Brooks, 'God damn him, he swore a lie on me, and I will kill him before night.' Witness said, that Brooks had left the premises before that time, and was some distance off, on

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the road to the plantation where he was employed; that defendant also left the premises, a few minutes after making said threat, and proceeded in the direction in which said Brooks had gone; that shortly afterwards, in from three to five minutes, witness heard three pistol shots in the direction in which the defendant had gone, and about three or four hundred yards off, but could not see who fired them;" and that he thereupon issued his warrant for the arrest of the defendant, and, on a subsequent hearing, bound him over to answer the indictment in this case. The State also introduced Austin Scott and Henry Scott as witnesses, who were at work in a field on the side of the road at the time of the shooting, and about one hundred yards distant. Austin Scott testified, "that he saw the defendant fire, but could not tell whether he shot at Brooks, or over him; that he saw the defendant throw up his hands in the direction of said Brooks, but could not see whether he shot at him, or over him, or under him; that he heard but two shots, but heard considerable noise from the party at or near the shooting; heard some one tell Brooks to run, and heard defendant say, 'Yes, God damn you, you had better run.'" Henry Austin testified, "that he saw defendant shoot in the general direction of said Brooks, but could not tell whether he shot at him or over him; did not hear defendant say anything to Brooks; did not see Abe Dorsey between said Brooks and defendant, and did not see any one between them."

The State having here closed, the defendant introduced Alex. Williams as a witness, who testified, "that he was with Abe Dorsey and some others, on the road-side leading from Mitchell's, when defendant passed them, having his pistol in his hand; that he said to defendant, 'Matt, don't shoot Spencer Brooks'; and that defendant replied, 'I am not going to shoot him—I am only going to scare him.' Witness said, that he followed defendant, and was next to Abe Dorsey behind him; that the defendant fired the first shot in the direction of said Brooks at a distance of about one hundred yards, but above his head; that he overtook the defendant, and was present when the other shots were fired; and that they were fired over the head of said Brooks, and not at him. Witness said that, by 'one hundred yards,' he meant not quite the length of the court-room; which is about thirty yards long."

"This was all the evidence, and the court thereupon charged the jury, in writing, as follows: '*An assault is an attempt to strike, in striking distance, or shoot in shooting distance. If the defendant shot at Spencer Brooks, and within reasonable distance that the pistol would carry the ball, so as to*

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cause injury to the party shot with a pistol, then he is guilty of an assault. And if he did this with the malicious intent to kill him, and you are satisfied of both these facts from the evidence, beyond a reasonable doubt, [and] that it took place in this county, then you should find the defendant guilty as charged; and your verdict would then be, 'We, the jury, find the defendant guilty as charged.' If you are not satisfied, beyond a reasonable doubt, of the intent to murder, but are satisfied beyond a reasonable doubt that he is guilty of the assault, then your verdict will be, 'We, the jury, find the defendant guilty of the assault as charged;' and then you will assess a fine, not more than \$500. If you have a reasonable doubt as to the defendant's guilt of an assault, then you will find him not guilty. You will carefully weigh the evidence (which is the statement of the witnesses from the stand, as the court has permitted it to come to you), with all the circumstances proved in the case, and then say—first, are you satisfied beyond a reasonable doubt of the assault; and then, in the same way, you will ascertain the intent with which the assault was made—was it made, and with the intent to murder? To ascertain this, you may look to the feelings of the defendant to the party assaulted, and to any threats, if any proven, before the shooting, and if there was any weapon used, and all the circumstances under which it was used. It is your duty to reconcile the testimony, if you can; and if you can not, you must give credit to that part which you believe to be true. You will weigh the testimony for yourselves, and ascertain what is the truth; and if you are satisfied, beyond a reasonable doubt, of the defendant's guilt, it is your duty to say so by your verdict. If you have a reasonable doubt of his guilt, it is your duty to find him not guilty."

To the italicized portions of this charge the defendant reserved three separate exceptions: the first, to the first sentence; the second, to the first and second sentences; and the third, to the entire italicized portion of the charge. The court charged the jury, also, at the request in writing of the defendant—1st, "that to sustain a conviction of an assault with intent to murder, the State must show, to the satisfaction of the jury, that the defendant was near enough to Spencer Brooks to kill him;" and, 2d, "that the intent with which the defendant shot at Spencer Brooks is a material fact in the case, and must not be implied as matter of law, but must be ascertained by the jury from all the evidence in the case."

The jury having returned a verdict of guilty, the defendant afterwards made a motion for a new trial, which the court overruled: and the minute-entry then recites, "and the de-

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defendant being interrogated, and having nothing to say in bar or preclusion of the judgment of the court, the court thereupon sentenced the defendant to the penitentiary," &c. On a subsequent day of the term, the defendant entered a motion to amend and alter the judgment-entry in this respect; filing in support of it his own affidavit, to the effect that he did not hear or understand the court to ask him if he had anything to say why judgment should not be rendered against him on the verdict; and the affidavits of both of his attorneys, to the effect that the question was not asked him. The court overruled this motion, and the defendant excepted to the overruling of it. The minute-entry, or judgment overruling the motion, states that the "distinct recollection" of the presiding judge was that the question was asked as recited; "and in this recollection the judge was sustained by the recollection of the solicitor, the sheriff, and two of his deputies, who were present;" and further, that the court then again asked the defendant if he had anything to say against the rendition of judgment, &c.

SMITH & GLAZE, for the prisoner.—1. Evidence of a substantive offense, distinct from that for which the accused was on trial, ought not to have been received.—*Tarver v. The State*, 43 Ala. 354; *Gassenheimer v. The State*, 52 Ala. 313; *Ingram v. The State*, 39 Ala. 247, 251; *Mason & Franklin v. The State*, 62 Ala. 543. The particulars of the former offense, as detailed by Brooks and Mitchell, were clearly inadmissible, and should have been excluded.—Authorities *supra*; also, *Ogletree v. The State*, 28 Ala. 693.

2. The court erred in the definition of an assault, as shown by the first part of the charge to which an exception was reserved. All the authorities agree, that an intent to do violence to the person of another, and a present ability to carry the attempt into execution, must concur, to constitute an assault.—*Lawson v. The State*, 30 Ala. 14; *Blackwell v. The State*, 9 Ala. 79; *Shaw v. The State*, 18 Ala. 547; *Simpson v. The State*, 59 Ala. 18; Wharton's Amer. Cr. Law, § 1241.

3. On the question of intent, as an element of the offense charged, the charge of the court is open to most serious objection. An assault with intent to murder is made a felony by statute, while an assault with intent to kill or maim remains a misdemeanor, as at common law. To make out the felony, the specific intent must be proved as charged—that is, an intent which, if carried into successful execution, would make the act murder at common law. A malicious intent to kill is nothing more than an intent to kill, and would not make the assault more than a misdemeanor.—*Burns v. The State*,

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8 Ala. 313; *Mullen v. The State*, 45 Ala. 45; *Simpson v. The State*, 59 Ala. 18; *Meredith v. The State*, 60 Ala. 446; *Ogle-tree v. The State*, 28 Ala. 693. Again, it is not sufficient that the party assaulted was within the reasonable distance to be injured by the shot: he must have been within the reasonable distance to be killed by it.—*Mullen v. The State*, 45 Ala. 45.

4. The motion to correct the judgment-entry should have been allowed. All the evidence showed that, in legal effect, the question had not been asked before sentence; and the error was not cured by asking it afterwards. The "distinct recollection" of the judge was not under oath, and was not evidence of any thing; and its recital in the judgment-entry gives it no validity. That the defendant had the legal right to have the question asked before sentence, see *Croker v. The State*, 47 Ala. 53; *Mullen v. The State*, 45 Ala. 44; *Perry v. The State*, 43 Ala. 21; *Crim v. The State*, 43 Ala. 53.

H. C. TOMPKINS, Attorney-General, *contra*.—The intent with which the assault was committed, and which was the main issue in the case, could only be proved by the defendant's conduct, acts, and declarations; and any evidence which, if death had ensued, would be admissible in proof of malice, is competent evidence to show the intent.—2 Wharton's Amer. Cr. Law, §§ 635*a*, 635*b*; *Hudson v. The State*, 61 Ala. 334. If any particular details were stated by the witnesses, not within the rule, they ought to have been specifically pointed out.—*Gayle v. Railroad*, 8 Ala. 586; 1 Brick. Digest, 886, § 1186. As to the testimony of Mitchell, see, also, *Neal v. The State*, 53 Ala. 465; *Childs v. The State*, 58 Ala. 349.

2. There was no error in the charge of the court.—*State v. Blackwell*, 9 Ala. 79; *Johnson v. The State*, 35 Ala. 363; 2 Bishop's Crim. Law, ed. 1858, § 32; 1 Russell on Crimes, m. p. 1004; *Meredith v. The State*, 60 Ala. 441; *Sharp v. The State*, 19 Ohio, 379; *Cole v. The State*, 5 Eng. 318.

3. The motion to correct or set aside the judgment was nothing more than a motion for a new trial on that question, and can not be reviewed. Besides, the judgment-entry shows that the question was asked.—*Spigener v. The State*, 58 Ala. 421.

STONE, J.—The prisoner was indicted for an assault with intent to murder Spencer Brooks, which, under our statute, is made a felony. In a trial under such indictment, the intent with which the alleged act was done becomes a material inquiry. As in the case of the kindred though higher crime of murder, formed design, coupled with the attempted

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use of means capable of producing the result aimed at, makes the offense complete, although in this lesser offense no actual battery or injury is inflicted. Hence, any testimony tending to prove malice aforethought, ill-will previously formed, ancient grudge, or any other probable motive for the act, is admissible, as shedding light on the question of intent, or incentive of the crime. And, under this head, it is permissible to prove previous threats, previous altercations, or prior combats, although such proof may establish the commission of another and substantive offense, for which a separate indictment would lie. Such proof is received, not as constituting any part of the crime for which the prisoner is being tried: its object and scope are to show the relations of the parties, and to aid the jury in determining whether there was the formed design, or felonious intent to commit the crime of murder. Cherished hate, or ill-will, is one of the incentives to murder. But, it is the fact of such previous altercation or combat, and not the particulars or merits of the quarrel, that can be put in evidence.—*Hudson v. The State*, 61 Ala. 333; *Noles v. The State*, 26 Ala. 31; *Ingram v. The State*, 39 Ala. 247; *Martin v. The State*, 28 Ala. 71; *Commander v. The State*, 60 Ala. 1; *Faire v. The State*, 58 Ala. 74. Under this unquestioned principle, all the evidence objected to was clearly admissible. And it is not shown that any of the details or particulars of the former rencontre, or altercation, were put in evidence. Hence, no field is shown for the operation of the rule, that the fact only, and not the particulars, of a former quarrel, can be given in evidence. This record fails to show any evidence which the City Court should have excluded, on the prisoner's motion to exclude so much of the testimony as tended to show the details of any previous difficulty between the parties.

2. The first exception to the charge is to the words, "an assault is an attempt to strike in striking distance, or shoot in shooting distance." This is the language of some of the authorities; while others are a little more specific, and say there must be an attempt coupled with a present ability to inflict a battery.—*Clark's Manual*, §§ 618, 619, 620, 621, 622; 2 *Bish. Cr. Law*, 6th ed. §§ 23, 28, 30, 31; *State v. Blackwell*, 9 Ala. 79; *Johnson v. The State*, 35 Ala. 363; *Meredith v. The State*, 60 Ala. 441. The word 'attempt' means, 'to make an effort, or endeavor, or an attack.' An attempt implies more than an intention formed. Some step towards consummation must be taken, before the intention becomes an attempt. Attempt to strike in striking distance, or to shoot in shooting distance, includes the intention, present ability, and some effort or endeavor to carry that intention into exe-

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cution. An effort to strike, within striking distance, is an assault. An attempt to shoot, within shooting distance, imports that the assailant had in his possession some description of fire-arm, that he made an effort to use it, and the person on whom he attempted to use it was within the distance the fire-arm would effectively project or discharge its ball. Less than this would not be an attempt to shoot in shooting distance. But, the sentence we have been criticising, is merely the introductory sentence of the charge. Further on, the court explained what was necessary to constitute an attempt; and construing the charge in reference to the evidence, the City Court did not err in the language covered by the first exception.

3. Having reached the conclusion that the City Court did not err in the language quoted above—the subject of the first exception to the charge—it follows that there is nothing in the other two exceptions; for each of them embraces the language decided above to be free from error, and some other part of the charge of the court, in one and the same exception. An exception to a charge, separable into two or more distinct propositions, will not avail, unless each of the propositions be erroneous. Parties excepting must direct the attention of the court to the error complained of; for the court, having attention thus directed to the particular point of exception, may, *ex mero motu*, withdraw the language objected to, or opposing counsel may consent to its withdrawal. *Bernstein v. Humes*, 60 Ala. 582; *South & North Ala. Railroad v. Jones*, 56 Ala. 507. But, when the charge is construed in reference to the evidence, we do not think the court erred in any part of the charge that was excepted to. Under the evidence, the real points of controversy in the court below must have been—first, was the prisoner, when he fired his pistol, within shooting distance of Brooks; second, was it his intention to shoot him, or did he only intend to frighten him? These were questions for the jury, and the record fails to show they were not fairly presented in the charge of the court.

4. There is nothing in the other exceptions reserved which can benefit the accused. The record of the court below imports absolute verity, and testimony can not be received to assail it, in the absence of a statute authorizing such inquiry. There is no statute authorizing this court to correct the judgment-entry, as was sought in this case.—*Weir v. Hoss*, 6 Ala. 881; *Deslonde v. Darrington*, 29 Ala. 92.

The judgment is affirmed.

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Indictment against Overseer of Public Road.

1. *Sufficiency of indictment.*—An indictment against the overseer of a public road, which alleges that he “failed to discharge his duties as such overseer,” without averring any particular failure or neglect of duty by him, is made sufficient by the statute (Code, § 4810), although it would be fatally defective at common law.

2. *Evidence under such indictment; conclusiveness of judgment.*—Under such a general indictment, not specifying any particular neglect of duty, the State is not confined to evidence of any one particular act or neglect of duty, but may give evidence as to any and every neglect within the period covered by the indictment; and the judgment will be a bar to another prosecution for any of such acts which might have been proved, though no evidence was in fact offered in reference to them.

3. *Neglect of overseer to repair public road; excuses.*—It being shown that the road was out of repair for more than ten consecutive days, and that the overseer had failed to have it worked ten days in the year by the persons subject to his control for that purpose, this makes out an indictable neglect of duty on his part (Code, §§ 1649, 4252); and neither the character of the soil, preventing permanent repairs, nor the fact that no one has been injured or hindered by the bad condition of the road, constitutes any excuse for the default.

FROM the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The indictment in this case was found in October, 1878, and charged that the defendant, Linton McCullough, “being a duly appointed and acting overseer of a public road, running from the residence of the late Richard Olin to the line of Pike county, failed to discharge his duties as such overseer, against the peace,” &c. The defendant demurred to the indictment, “because it does not disclose the nature and cause of the accusation;” and his demurrer being overruled, he then pleaded not guilty.

“On the trial,” as the bill of exceptions states, “the State offered evidence tending to show that a bridge, about eighty feet long, on the road described in the indictment, had rotted and fallen down while defendant was overseer, and was not rebuilt by him; and then offered evidence tending to show that the road-bed, on other parts of the said road, had been out of repair while defendant was overseer. To this last evidence the defendant objected, on the ground that the State had already introduced evidence of a different offense. The court overruled the objection, and stated that the State might prove the neglect on the part of the defendant to per-

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form any duty imposed by law on him as overseer. The evidence was admitted, and the defendant excepted. The State introduced evidence, also, tending to show that the road was in good condition when it was turned over to the defendant, and that he permitted it, while under his management, to become in bad repair generally, to such an extent that numerous complaints were made by citizens living along said road; also, that gullies, to the depth of two or three feet, which might easily have been filled up, were suffered to remain by the defendant; also, that the road under his care might have been made better, and as good as the average country roads, if the defendant had properly discharged his duties as overseer; and that the approaches to the bridge were in bad condition, which might have been repaired. The evidence for the defendant tended to show that the road described in the indictment had been a bad road from time immemorial, owing to the unevenness of the country through which it passes, and the great tendency of the soil, when once broken up, to wash into gullies; that in many places in the road, and on both sides of it, large and deep gullies had been formed; that the road had been gradually changed, without opposition from the adjacent land-owners, as occasion required, so as to go around these gullies; that no attempt had ever been made to fill them up; that they could not be filled up, with the means at the command of the overseer; and that filling them up, with such material as the overseer had, if it could be done, would be of no benefit, as it would be washed out by the first rain. The evidence tended to show, also, that said road was six miles and a half long; that the number of hands furnished to defendant to work the same was about twenty; that the defendant was under twenty-one years of age, and was appointed to fill a vacancy, in April, or, as some of the witnesses testified, about the middle of July, the indictment being found at the succeeding October term; also, that the defendant, soon after his appointment, warned out the hands, and worked the road four days and a half; also, that no person was prevented from passing on said road while he was overseer; that it was used by the public as usual; that it was in as good condition as it had ever before been, and that no accident happened thereon while he was overseer, or s on thereafter. One witness testified, that he had hauled sixty bales of cotton to market over said road, during the fall of that year, without difficulty. It was proved, also, that said road lay in Montgomery county.

“The foregoing was all the evidence in the case; and the court thereupon charged the jury, at the request of the so-

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licitor, in writing, as follows: 'Granting that the road needed repair, if the jury believe that the defendant could have amended its condition, whether by temporary patch-work or otherwise, so that the road could thereby have been made passable even temporarily, and *over* (?) a temporarily good country road, and failed to do so, then the defendant is guilty of a default in duty as a road overseer, and should be fined accordingly.' The defendant excepted to this charge, and requested the court, in writing, to charge the jury as follows: 'In the consideration of the question of the defendant's guilt, the jury may look to the condition of the road when he received it, the character of the soil, the resources lawfully within his reach, and the fact (if shown by the evidence) that no person was injured, or prevented from passing in a wagon or otherwise, during the time defendant was overseer, or soon afterwards.' The court refused this charge, and the defendant excepted to its refusal."

THOS. M. ARRINGTON, for the defendant.—1. The indictment is insufficient, and the demurrer to it ought to have been sustained. The statute imposes a multiplicity of duties on overseers of roads, for the neglect of any one of which they are indictable; and the indictment should specify the particular default or neglect for which a conviction is sought. Less than this does not meet the constitutional requirement—does not inform him of the nature and cause of the accusation. If the legislature can dispense with every material averment of fact, where is the limit to its power in this direction? In vagueness and indefiniteness this indictment goes far beyond any which has hitherto been sustained.—*The State v. Nowlin*, 49 Ala. 41; *Henry v. The State*, 33 Ala. 390; *Noles v. The State*, 24 Ala. 672.

2. The State should have been confined on the trial to evidence of one offense, and should not have been permitted to offer evidence of several distinct offenses.—*Elam v. The State*, 26 Ala. 48; *Hughes v. The State*, 35 Ala. 351.

3. The State seems to have sought a conviction under the clause of the statute in these words: "or allows his precinct, or any part of the same, to be out of repair for more than ten days at any one time, without a good excuse," &c. To "allow" implies knowledge on the part of the defendant, which is ignored by the charge of the court. It was necessary for the State to show, not only that the road was out of repair, but also that it was in that condition for ten days or more; and this element of the offense is also ignored by the charge. Nor was the defendant bound to repair at his own expense, or with his own private means; yet the charge ig-

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nores the means and resources furnished him by law, and makes him guilty if *he* could have repaired. The failure to repair is not, of itself, sufficient to warrant a conviction: the offense consists in the failure to repair "without a good excuse;" and though the court must determine the sufficiency of the excuse, the jury must pass on the weight and credibility of the evidence introduced to establish it. The charge asked should, therefore, have been given.

H. C. TOMPKINS, Attorney-General, for the State.—1. The indictment pursues the words of the statute (Code, § 4810), and must be held sufficient, on the authority of numerous cases.—*Noles v. The State*, 24 Ala. 672; *Weed v. The State*, 55 Ala. 13; *Ulmer v. The State*, 61 Ala. 212; *Hill v. The State*, at the last term.

2. The offense charged is continuous in its nature, and embraces a series of acts. It did not present a case of election. *Peacher v. The State*, 61 Ala. 22, and authorities there cited.

3. It was clearly proved that the road was out of repair; and the defendant could only excuse himself by showing that he had fully performed his duty in working it. This he did not attempt to show, but only sought to prove that, if he had worked it it could not have been made and kept permanently good. The facts presented no excuse, and their sufficiency was a question for the court.

BRICKELL, C. J.—1. The indictment is certainly insufficient at common law; and would be insufficient under the statute (Code of 1876, § 4785), which requires that the facts constituting the offense shall be stated in ordinary and concise language, if it were not authorized expressly in its present form by the subsequent section of the Code—§ 4810. *Noles v. The State*, 24 Ala. 672. There is great force in the argument of the counsel of appellant, against the constitutionality of statutes which authorize such vague and indefinite criminal accusations, not affording the accused reasonable information of the *nature and cause of the accusation against him*; but we are not at liberty to regard the question as open for discussion and decision. For more than twenty-six years, after repeated argument and deliberation, in respect to all crimes, from the highest to the lowest in degree, indictments, founded on and sanctioned by such statutes, have been supported by this court, whenever their sufficiency was assailed; and we must be content to abide the results. It is the province of the legislature to interfere, and not of the courts, to disturb that which has been settled so long, and after so much of argument and deliberation.

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2. The indictment includes the neglect or failure of the defendant to perform any or all of the duties which are imposed upon him by law, for which he is not otherwise made answerable.—Code of 1876, § 4252. It is not limited and confined to any single omission or neglect of duty, as would be an indictment for a single act. The guilt of the accused may consist in a single omission, or a series of omissions of duty; and the judgment, whether of conviction or acquittal, will operate as a bar to any future prosecution, without regard to the omissions of which evidence may be given on the trial. It is not for a single violation or omission of duty, unless that is specifically averred, it can be intended the grand jury have found the bill; but for any and all omissions of duty, which are indictable, and of which evidence may be given. When an indictment includes but one offense, and is incapable of proof of more than one, all similar offenses being of themselves indictable, the proof must be confined to one. When the general forms of the Code, in relation to such offenses, are followed, if the State proceeds far enough in the evidence to individualize any particular act or transaction as the offense, an election is made to proceed for that act or transaction; and there can not be, against the objection of the defendant, any waiver or abandonment of it, and resort to others for the purpose of conviction.—*Elam v. The State*, 26 Ala. 48; *Hughes v. The State*, 35 Ala. 351; *Peacher v. The State*, 61 Ala. 22. The judgment, in such case, will operate as a bar only to the act of which evidence is given; and it is to that act the indictment refers, or is presumed to refer. But the present indictment is not presumed to refer to any single neglect of duty, of which the defendant may have been guilty, or which may be imputed to him, but to any and every neglect of duty which can be imputed to him during the period covered by it—the twelve months before its finding; and judgment upon it will operate a bar to any other indictment for any of such neglects, whether evidence of them be or not given on the trial. There was, consequently, no error in permitting the State to prove, or to give evidence in reference to, the failure to keep the bridge in repair, and also of the failure to work and keep in repair the road in the precinct of which the defendant was overseer. Each was included in the indictment.

3. The instructions given and refused by the court are not erroneous, in view of the evidence. It seems to have been an undisputed fact, that, for more than ten days, the road in the precinct of the defendant was in bad condition, or, in the words of the statute, *out of repair*. It had not been worked for ten days, with the hands apportioned to the defendant;

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and no excuse for the failure was offered or shown. The degree of the improvement which could have been made, if the duty had been performed, may not have been very great, or very durable. It was a public duty, resting on the defendant, to have made such improvement as he could, with the force and means of which the law gave him command; and a neglect of the duty subjected him to indictment. Nor was the neglect excused, because no person or property was injured, or hindered, in passing the road; nor because, on account of the character of the soil, any repairs made would not have been permanent. The statute pronounces that proof appellant was overseer, the road public, and the defaults, is sufficient for a conviction.—Code of 1876, § 4901.

We find no error in the record, and the judgment is affirmed.

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Indictment for Grand Larceny.

1. *Preliminary questions to witness, as to age, occupation, &c.*—It is a common practice, where a witness is put on the stand, to ask him his age, residence, condition in life, etc.; which questions are merely introductory, intended to aid the jury in putting a proper estimate on his testimony, and hardly the subject of exception. Under this practice, the prosecutrix in a criminal case may be asked, “if she was a widow.”

2. *Declarations of defendant; when not admissible as part of res gestæ.* Where the defendant was arrested under a charge of larceny, and at first denied having any of the stolen money, but afterwards offered to tell the police-officer, who professed to “know all about it,” where the money was, and said, that it was buried under the hearth in his house; and the officer having failed to find the money in the place indicated, the defendant went to his house with the officer, raised a brick in the hearth, and disclosed the money; and “after pointing out the money, defendant said it was given to him by” a servant in the employment of the prosecutrix; held, that this declaration was not admissible evidence for defendant, not being explanatory of possession, nor a part of the *res gestæ*.

From the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

N. McCARRON, for the prisoner, cited 1 Greenl. Ev. §§ 51, 52, 218; *The State v. Parke*, 48 Ala. 266; *Insurance Co. v. Moseley*, 8 Wallace, 397; *Rawson v. Haigh*, 2 Bing. 99; *Rex v. King*, Russ. & Ry. 331; *State v. Gilliam*, 50 Ala. 145; *Miller v. The State*, 54 Ala. 155; *Burrill on Cir. Ev.* 476-7; *Liles v. The State*, 30 Ala. 24.

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H. C. TOMPKINS, Attorney-General, for the State.

MANNING, J.—It is a common practice, on introducing a witness, to make inquiries of him respecting his age, residence, and condition in life. The answers, it is supposed, may aid the jury in setting a proper estimate on the evidence he may give. The question of the State's solicitor to Mrs. Fulton, "if she was a widow," was of this initiatory kind, and hardly subject to exception.

Appellant was prosecuted for the larceny, from Mrs. Fulton, of money and other things, among which was a \$20 gold-piece. Other important testimony having been submitted on the part of the State, a police-officer (one Bressingham) testified that, on arresting defendant, he said to him, that he had a \$20 gold-piece which witness would like to see; to which defendant answered, "that he had no gold-piece, or money of any description." He was then taken to the guard-house; but before locking him in, witness said to defendant: "I know all about it, and am going to find it." Defendant then replied: "Since you know so much about it, I am going to tell you where it is." And he then told witness that the gold-piece was buried under the hearth of defendant's house, in Warren street. Nothing more was then said. Witness went to the house on Warren street, made a search for the money, and failed to find it. Returning, he informed defendant of this, and asked him if he would go and point out the money. He answered, that he would; and going to his house with witness, raised a brick in the hearth, and pointed out the \$20 gold-piece. After doing so, defendant said that Jane Spear, a servant of Mrs. Fulton, had given him the money; and the witness having related this to the jury, the presiding judge, on motion, immediately made, of the State's solicitor, ruled out and excluded the declaration; to which defendant excepted.

Appellant's counsel is mistaken, in supposing that this declaration was admissible as of the *res gestæ*. What a person says that is explanatory of an equivocal or ambiguous act which he is then doing, or situation which he is then occupying—as that of a person in possession of property,—may be proved as *res gestæ*—a part of the thing then going on—to elucidate and define the character of such equivocal act or situation. Words so connected with, and illustrative of it, are considered as appertaining to the act or situation, and, like expression on the human face, as indicating character, the character of the act or situation which they relate to, and are blended with. This is the central idea of the doctrine respecting what is called *res gestæ*. In language

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quoted in the able argument of appellant's counsel, "In the complexity of human affairs, what is done, and what is said, are often so related, that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud, or falsehood, as to both; but there is no ground of objection to one, that does not exist equally as to the other. To reject the *verbal fact*, would, not unfrequently, have the same effect as to strike out the controlling member from a sentence, or the controlling sentence from its context."

The difficulty is in clearly discerning when such a relation or connection between language and acts exists. In *Rawson v. Haigh* (2 Bingh. 99), referred to for appellant, the question was, whether a departure from England was an act of bankruptcy; and that depended upon the intent of the person absenting himself. To show this intent, a letter written in France, a month after he went away, was received in evidence. Why? Because, being written during his stay abroad, it showed the reasons of his then continuing absence, and, by consequence, of his departure. It was explanatory of the writer's situation,—that of an absentee staying away to hinder and delay his creditors in England. "The departing the realm," said BEST, C. J., "is a *continuing* act, and these letters were written during its continuance."

But, there are numerous decisions of this, and of other courts, that words merely narrative of something past, as of the manner in which the speaker obtained title to property in his possession, are not admissible as *res gestæ*.—See 1 Brickell's Dig. p. 845, §§ 554 *et seq.* And precisely of this kind was the declaration of defendant, that Janè Spear had given him the \$20 gold-piece. If, by saying this at the time he said it, defendant could discharge himself of the offense which other evidence tended to show he had before that time committed, a shrewd law-breaker could easily contrive to manufacture evidence to screen him from legal condemnation. There was no error in excluding the declaration.

It appears to us that there was no foundation in the evidence for the two charges asked for appellant which the judge refused to give to the jury.

The judgment of the City Court must be affirmed.

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Haley v. The State.

Indictment for Slander of Female.

1. *Statement of name of third person in indictment.*—It is not good matter for a plea in abatement, that, in stating the name of a third person in an indictment, the initial letter of his Christian name is used, instead of the name itself.

2. *Misnomer; plea in abatement as to.*—The defendant being indicted by the name of "*Zack, alias Zachariah,*" and pleading in abatement that his true name was *Zacary*; and the evidence showing that, while his true name was *Zacary*, he was generally known and called by the name of *Zack*, which some of the witnesses supposed was an abbreviation of his true name; held, that the court did not err in instructing the jury, "if they believed from the evidence that he was generally and as well known by the name of *Zack* as any other," they must find the issue against the defendant; nor in refusing to charge, at the instance of the defendant, "that if he was called and known by the name of *Zack*, as an abbreviation, or initial of his proper name, and that his proper name was *Zacary*, and not *Zachariah*, or *Zack*," they must find the issue for the defendant.

3. *Impeaching and sustaining witness.*—When a witness is interrogated, on cross-examination, as to former inconsistent declarations, and denies that he made them, he may state, in rebuttal, what he did say on the particular occasion specified.

4. *Same*—When a witness has been impeached by proof of former declarations inconsistent with his testimony, his credibility may be sustained by proof of his general good character.

5. *Same*.—It is permissible to prove a previous dispute between the accused and a witness for the prosecution, as tending to show the existence of unfriendly relations between them; but, when the subject of the dispute has no connection with the offense for which the accused is on trial, the witness cannot be impeached by the contradictory testimony of others.

6. *Proof of character; competency of witness.*—A witness, who states that "he knows the general character of the defendant from rumor," is not competent to testify in reference to it.

7. *Slander of female, by words imputing want of chastity; malice as element of offense.*—To authorize a conviction for the slander of a female by words "falsely and maliciously imputing to her a want of chastity" (Code, § 4107), it is not necessary that the accused should have entertained any special personal malice towards the person defamed: if the words are false, naturally tend to the injury of the person defamed, and were spoken recklessly, though without special ill-will, a conviction may be had.

FROM the Circuit Court of Lee.

Tried before the Hon. W. B. Wood.

The indictment in this case charged, that the defendant, "*Zack, alias Zachariah Haley*, did falsely and maliciously speak of and concerning *Mollie Goins*, in the presence of *J. McLendon*, charging her with a want of chastity, in substance as follows: that the said *Mollie Goins* was whoring about through the country; against the peace," &c. The defendant filed two pleas in abatement, each duly verified; the

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first averring "that his true name is, and always has been since his birth, Zacary Haley, and he has never been known or called either Zack or Zachariah Haley;" and the second, "that the name of the party mentioned in said indictment, to whom, or in whose presence, the defendant is alleged to have made use of the alleged slanderous language, is James McLendon, and not J. McLendon, as charged in said indictment, and that he has never been known or called by any other name." The court sustained a demurrer to the second plea; and issue being joined on the first, it was submitted to a jury for trial. On the trial of this issue, as the bill of exceptions recites, "the defendant introduced his father as a witness, and also two other persons who had known him from his birth, and knew his Christian name, which was Zacary Taylor; that his family and neighbors called him Zack 'for short,' and as an abbreviation of his true name. The defendant also introduced his father's 'Family Bible,' containing the record of the births of his children, in which the defendant's was thus entered: '*Zacary Taylor Haley, Jan. 1, 1845.*' The State then introduced several witnesses, who swore, that they had known defendant for a number of years, and had only known him by the name of Zack; and that he answered to that name when called. Some of these witnesses stated, that while they did not know defendant by any other name than Zack, yet they always supposed it to be an abbreviation of his true name; while others of them swore, that they knew him alone by the name of Zack. This was all the testimony on the plea in abatement;" and the court thereupon charged the jury, "If the jury believe, from the evidence, that the defendant is generally and as well known by the name of Zack as any other, they will find for the State." The defendant excepted to this charge, and then requested the court to give the following charges, which were in writing: 1. "If the jury believe, from the evidence, that the defendant was known and called by the name of Zack as an abbreviation or initial of his proper name, and that his proper name was Zacary, and not Zachariah, or Zack, as charged in the indictment, then they must find the issue on the plea for the defendant." 2. "If the jury believe, from the evidence, that the defendant's true name was Zacary, and that he was only called Zack 'for short,' or as an initial or abbreviation, they must find for the defendant, although it may appear that many persons did not know what his true name was." The court refused each of these charges, and the defendant excepted to their refusal. The jury found the issue against the defendant, and he then pleaded not guilty; on which issue was joined, and a trial had.

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During the trial, the defendant reserved several exceptions to the rulings of the court as to the admissibility of evidence, and also an exception to the refusal of one of the charges asked by him; but the material facts in reference to these matters are stated in the opinion of the court, and it is not necessary to state them in this place.

GEO. D. & GEO. W. HOOPER, and GEO. P. HARRISON, for the defendant, cited *Lawrence v. The State*, 59 Ala. 61; *Dupree v. The State*, 33 Ala. 380; *Sorelle v. Craig*, 9 Ala. 534; and *Northcot v. The State*, 43 Ala. 330.

H. C. LINDSEY, with the Attorney-General, for the State.

STONE, J.—The Circuit Court did not err in the rulings on the pleas in abatement. The court rightly sustained the demurrer to the second of those pleas, and ruled correctly on the issues formed on the first.—*Franklin v. The State*, 52 Ala. 414; *Gerrish v. The State*, 53 Ala. 476. *Zack* is not an initial letter. It may be a name; and the jury found he was as well and readily known by the one name as the other. The testimony tends to show he was much more generally called and known by the abbreviated name, than by any other. The question is important only as a means of individualization, and of identification, should subsequent proceedings render the inquiry necessary. The case is unlike that of *Lawrence v. The State*, 59 Ala. 61.

3. The witness McLendon, introduced by the State, was asked, on cross-examination, if he had not, at a given time and place, made a certain statement to one Chappell, touching the matter of his evidence, which was variant from the testimony he had given. He answered, that he had not. In rebuttal, this witness was permitted to testify what he did say to Chappell on that occasion, and the defendant excepted. There is nothing in this exception. A witness who is sought to be impeached, by proof of prior contradictory statements, is entitled to have the matter brought to his attention, during his examination on the witness stand. Until he is so interrogated, it is not permissible to prove his prior contradictory statements. The purpose and policy of this rule are, that the witness proposed to be assailed in this way, may have an opportunity of explaining it, and of showing what he did say. It then becomes a question of recollection between the witnesses, if both are inclined to speak the truth. 2 Brick. Dig. 548, §§ 117 to 121, inclusive.

4. Chappell having been afterwards introduced, and having testified to prior variant statements by McLendon, it was

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permissible to sustain the credibility of the latter, by proof of his general good character.—2 Brick. Dig. 547, § 104.

5. The testimony of a previous dispute between the witness McLendon and the accused, concerning cotton-seed, was only important as showing the relations, friendly or otherwise, between them. While it was lawful to prove this alleged dispute or quarrel, either by McLendon or any other witness, as tending to show unfriendly relations between the witness and the defendant, the relevancy of the evidence extended no further. The dispute, and its subject, had no connection whatever with the offense for which the defendant was on trial. Hence, it could not be the ground of impeaching the witness, by contradictory testimony of other witnesses.—*McHugh v. The State*, 31 Ala. 317; 2 Brick. Dig. 549, § 125; *Bullard v. Lambert*, 40 Ala. 204; 1 Greenl. Ev. §§ 462, 469.

6. The witness Matthews was asked, "if he knew the general character of the defendant in his neighborhood, from rumor." This question the court allowed to be answered, and defendant excepted. The witness said, he knew said character from rumor, and that it was bad. The defendant had previously introduced witnesses, whose testimony tended to prove his good character. Character is the estimation in which one is held in the community; reputation—the estimate put upon him. This estimate may be just or unjust, true or false; still, it is character. It is judged by many things, some of which it would be difficult, if not impossible, to define. All the authorities admit, that what the public generally say of a person, and the manner in which he is received and treated in society, are among the tests by which his character is determined. When a witness knows this character, although he may have no personal knowledge of any act of his life, he is competent to testify in regard to it. But, these are not the only sources of the witness' information. He may know his character, although he never heard it canvassed, and does not even know a majority of his neighbors.—*Hadjo v. Gooden*, 13 Ala. 718; *Martin v. Martin*, 25 Ala. 201; *Ward v. The State*, 28 Ala. 53. If he says he knows his general character in the neighborhood in which he lives, this is enough, unless it is shown, on cross-examination, that he does not understand the question, and has not the requisite knowledge.—*Bullard v. Lambert*, 40 Ala. 204. But rumor is not always reputation. The word has many meanings. Its most common and accepted signification is, a flying report, traceable to no known or responsible source. Hence, a knowledge of character, derived from rumor, may be no more nor less than that furnished by a flying report,

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brought to the knowledge of the witness. He may know nothing of the estimate in which the person of whom he testifies is held, beyond that which is brought to him by a flying report. Still, a non-professional witness, having only this information, might ignorantly and innocently answer that he knew the general character from rumor. All legal practitioners have encountered difficulty, in bringing to the comprehension of witnesses the legal import of the words general character, when they became the subject of inquiry. We think the question and answer copied above should not have been allowed.—*Sorelle v. Craig*, 9 Ala. 534; *Campbell v. The State*, 23 Ala. 44. We do not think the court erred in any other ruling on the admission of evidence.

7. The defendant was indicted under the first clause of section 4107 of the Code of 1876, which declares, that "any person who writes, prints, or speaks, of and concerning any female, falsely and maliciously imputing to her a want of chastity, . . . shall be deemed guilty of a misdemeanor." It is contended for defendant that, to constitute this offense, the accused must have entertained malice towards the female slandered; and he asked the court to so instruct the jury, which was refused. The charge refused, which raises this question, is in the following language: "Malice to the party defamed is an essential ingredient of the offense charged; and the defendant must have used substantially the words charged, with this malice, otherwise the jury must find for the defendant." "Malice," says Mr. Bishop, "in general phrase, is never understood to denote general malevolence, or unkindness of heart, or enmity towards a particular individual; but it signifies rather the intent from which flows any unlawful and injurious act, committed without legal justification."—1 Bish. Cr. Law, 6th ed., § 429. This definition of malice is supported by a long line of able decisions. It is that evil mind that intentionally violates the law, without the moral sanction of honest conviction supported by probable cause, to excuse it. When the words or acts are groundless, intentionally wrong, or reckless, and tend naturally to the injury of another in some right which the law has secured to him, this is malice, whether the offender entertained ill-will to the person injured or not. Under the peculiar phraseology of our statute punishing malicious mischief, and the disposition which the law makes of the fine on conviction, it has been ruled that, to insure conviction under that statute, there must be malice to the owner of the animal injured.—*The State v. Pierce*, 7 Ala. 728; *Northcot v. The State*, 43 Ala. 330. But, see *Hill v. The State*, *Id.* 335, where it is said, "as the killing was with an instrument, the use of

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which commonly destroys life, malice might well be inferred by the jury." The charge in that case was, "unlawfully and maliciously killing a hog, the property of Betty Ray."

In the case of *Rex v. Hunt*, indicted under the English statute for "maliciously cutting" one Cambridge, the proof tended to show that the malice was towards Headly, and that the prisoner cut Cambridge without intending it. The case was reserved, and went before the judges of England. The judges ruled, that "general malice was sufficient under the statute, without particular malice against the person cut."—1 Moody, 93.

In *Salmon's case*, 1 Russ. & Ryan, 26, the indictment was for "voluntarily, willfully and maliciously setting fire to the haystack of one John Catling." Defendant was convicted, and the case went up on questions reserved. All the judges of England "were of opinion, that the conviction was right; . . . that it was not necessary that there should be malice against the real owner of the hay."

In the case of *Com. v. Snelling*, 15 Pick. 321—indictment for a malicious libel—the court, C. J. SHAW delivering the opinion, said: "It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill-will towards the individual, or that he entertain and pursue any bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but, if, in pursuing that design, he willfully inflicts a wrong on others which is not warranted by law, such act is malicious."

Under the statute of North Carolina to prevent malicious maiming, it was decided, Justice RUFFIN being the author of the opinion, that the words of the statute "do not mean an actual, express, or preconceived disposition; but import an intent, at the moment, to do, without lawful authority, and without the pressure of necessity, that which the law forbids." Of similar import are *Com. v. Bonner*, 9 Metc. 410; *The State v. Doig*, 2 Rich. S. C. 179; *Com. v. Green*, 1 Ashm. 289; *Dexter v. Spear*, 4 Mason, 115; *Taylor v. The State*, 4 Ga. 14; *Griffin v. Chubb*, 7 Tex. 603.

In *Long v. Rogers*, 19 Ala. 321—a suit for malicious prosecution—this court said: "It is well settled, that to sustain this action, there must be malice, as well as a want of probable cause. But, when the law speaks of malice in this connection, it does not imply that there should be actual ill-will, or a desire to injure the party prosecuted through revenge or spite. If the prosecutor, in the entire absence of any probable or reasonable grounds justifying even a suspicion of the party's guilt, sets the prosecution on foot, the legal

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implication of malice necessarily arises."—*Durr v. Jackson*, 59 Ala. 203.

The Circuit Court did not err in refusing to give the charge copied above. The court erred in refusing to give the charge numbered 7, asked by defendant; but the record fails to show this ruling was excepted to. We find no other errors in the record.

Reversed and remanded. Let the defendant remain in custody, until discharged by due course of law.

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Indictment for Slander of Female.

1. *Plea in abatement, for misnomer; waiver of.*—A plea in abatement, regularly filed, on account of a misnomer, is waived by the subsequent interposition of a demurrer, or other pleading, which, in effect, admits that the defendant is the person charged; and when so waived, this court will not inquire into the correctness of the rulings of the court below on the plea, since they could be, at most, only error without injury.

2. *Sufficiency of indictment.*—A form of indictment being prescribed by the statute, for defamation or slander of a female (Code, § 4107; Form No. 56, p. 997), according to repeated decisions of this court, it is sufficient to follow the prescribed form.

3. *Averment of defendant's name.*—When the pleader has any doubts as to the Christian name of the defendant, it may be averred in the indictment under an *alias*.

4. *Proof of words as laid.*—Since the statute does not require the precise words spoken to be set out in the indictment, but only the substance of them, it is not necessary to prove the speaking of the very words as charged: evidence of other words, substantially corresponding with the averment, is admissible, and sufficient to support a conviction.

5. *Meaning and explanation of words used.*—When the words used are unambiguous, and of ordinary acceptation and signification, the court and jury must construe them; but, when some cant phrase, or low expression, not having an ordinary acceptation, is used, a witness may testify as to its meaning.

6. *Evidence of words defamatory of other women.*—Evidence of words defamatory of other women, though uttered in the same conversation in which the alleged slanderous words against the woman named in the indictment were used, is not relevant, nor admissible against the defendant.

FROM the Circuit Court of Lee.

Tried before the Hon. JAMES E. COBB.

The indictment in this case charged, that the defendant, "Zack, *alias* Zachariah Haley, did falsely and maliciously speak of and concerning Emma Matthews, in the presence of Robert Goins, charging her with a want of chastity, in substance as follows: that he, the said Zack Haley, had had sexual intercourse with said Emma Matthews twice; against

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the peace, &c. The defendant filed a plea in abatement, duly verified by affidavit, averring that his true name was Zacary, and that he had never been known or called by any other name. To this plea the State replied, setting up as a bar the verdict and judgment upon a similar plea filed by said defendant to a similar indictment, decided on a former day of the same term of the court, as shown by the report of the case *ante*, pp. 83-88. To this replication the defendant demurred, but the court overruled the demurrer; and he then filed a rejoinder, to which a demurrer was interposed and sustained. The defendant also demurred to the indictment, assigning as causes of demurrer—1st, “because there is no allegation that Emma Matthews is a woman;” 2d, “because there is no allegation that she is a female;” 3d, “because the defendant is charged under the name of ‘Zack, *alias* Zachariah Haley,’ and there is no allegation that the surname of Zack is unknown;” 4th, “because the words alleged to have been spoken by this defendant are not set out literally, or according to their tenor, but only what is alleged to be their substance is set forth;” 5th, “because the words alleged to have been spoken by this defendant do not necessarily impute a want of chastity to Emma Matthews.” The court overruled the demurrer, and the cause was submitted to a jury on issue joined on the plea of not guilty. The plea in abatement, the replication thereto, the rejoinder, and the demurrer to the indictment, are all marked filed on the same day; but, in the judgment-entry, the demurrer to the indictment, and the ruling of the court thereon, are set out before the plea in abatement and subsequent pleadings.

During the trial, as appears from the bill of exceptions, the defendant reserved several exceptions to the rulings of the court on questions of evidence, which will be sufficiently understood from the opinion; and he also excepted to a charge given by the court, *ex mero motu*, in these words: “Malice, in a legal sense, denotes a wrongful act intentionally done, without just cause or excuse.” The court charged the jury, also, on the request in writing of the solicitor, as follows: “The jury should not captiously reject the testimony of any witness: the reasonable doubt, upon which the law authorizes an acquittal, must be actual and substantial, and growing out of the evidence on the stand: it is not a mere supposition, for every fact, depending upon moral evidence, is open to a supposed doubt.” The defendant excepted to this charge, and also to the refusal of the court to give a charge asked by him, which was in writing, as follows: “It is the duty of the State to prove that substantially the same words charged in the indictment were spoken

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by the defendant; and if the jury believe, from the evidence, that the defendant did not use the words charged, or substantially the words charged, then they must find the defendant not guilty, even though they may believe that he used words of similar import with those charged, and having the same meaning."

G. D. & G. W. HOOPER, and GEO. P. HARRISON, for the defendant.

H. C. LINDSEY, with the Attorney General, for the State.

BRICKELL, C. J.—A plea in abatement, because of the misnomer of the defendant, regularly precedes a demurrer, or a plea to the matter of the indictment; and is waived, if it is regularly pleaded, by the subsequent interposition of a demurrer, or other pleading, which, in effect, admits that the defendant is the person named or charged. It is not material to inquire, whether the rulings of the court on the plea in abatement, finally adjudging it insufficient, were correct or not. The court could have stricken the plea from the files, because the defendant had demurred to the indictment, and did not ask a hearing on the plea, until the demurrer was overruled; and if there was error in its rulings, there was no injury to the defendant.

2. By the common law, words impeaching the chastity of a female, not imputing an indictable offense, were not, unless followed by special damage, actionable slander.—*Berry v. Carter*, 4 St. & Port. 384. They were rendered *per se* actionable, by a statute enacted in 1830 (Clay's Dig. 538, § 1), which is substantially re-enacted in the Code.—Code of 1876, § 2971. A statute enacted in 1871, now forming section 4107 of the Code of 1876, converts the speaking of words, "*of and concerning any female, falsely and maliciously imputing to her a want of chastity,*" into an indictable offense; and on this statute the present indictment is founded. A form of indictment is prescribed, authorizing the setting out of the substance of the words spoken; which the pleader has pursued, and, according to repeated decisions of this court, the indictment must be pronounced sufficient in its statement of the offense.

3. Averring the name of the defendant, under an *alias dictus*, was proper, if the pleader had doubts which of the names averred was that by which the defendant was usually designated.

4. In civil actions for slander, the general rule is, that the words must be proved substantially as averred, or, at least,

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so much of them as may be necessary to constitute the slander. The rule is not satisfied by proof of slanderous words of equivalent import.—*Commons v. Walters*, 1 Port. 377; *Williams v. Bryant*, 4 Ala. 44; *Teague v. Williams*, 7 Ala. 844; *Easley v. Moss*, 9 Ala. 266; *Scott v. McKinnish*, 15 Ala. 662. The rule having its origin in the rule of the common law, requiring the slander to be averred, not according to its *purport*, or *effect*, or *substance*, but the *words spoken* (Townshend on Slander and Libel, § 329; Cooke on Defamation, 81), can have but a limited application to indictments founded on the statute, which are sufficient, if the substance of the words spoken is averred. And whenever the words proved in substance correspond to the averment of the indictment, and of themselves impeach the chastity of a female, without a departure from the statute, and nullifying the form of indictment authorized, evidence of them can not be excluded. The indictment avers, that the defendant, by speaking of the woman named words importing that he had with her sexual intercourse, imputed to her a want of chastity. The evidence offered was of the exact words spoken; and if these words imputed that the defendant, and not some other man, had illicit intercourse with the woman named, the averment was satisfied. There was not, and the statutory form does not intend there shall be, an averment of the precise words spoken, but simply the *substance*; and the substance is, according to the averment in this indictment, the imputation of a want of chastity, by his sexual intercourse with the female; and there could not have been a material variance, so long as the words proved were limited to his illicit intercourse with her, whatever may have been the form of expression he adopted in publishing his own and her shame.

4. The court and jury must construe the words, if they are unambiguous, and are of ordinary acceptance and signification. But slander is often uttered in some cant phrase, or in some low expression, not having an ordinary acceptance and signification; and if the slanderer chooses to adopt these, there can be no good reason for excluding proof of their meaning by a witness who knows it. In no other way could the slander be proved.—*Robinson v. Drummond*, 24 Ala. 174.

5. In the instructions given and refused, we do not find any error. But, in admitting evidence of the defendant's declarations in reference to other women, though uttered in the same conversation in which the offensive words were spoken of the female named in the indictment, there was error. It is not permissible to prove the utterance of slan-

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ders in respect to other females, which may, of themselves, constitute indictable offenses, to fix or aggravate the guilt of the defendant in reference to the specific accusation made against him. These declarations were separable from the slanderous words on which the indictment was founded, and proof of them could serve no other purpose than to prejudice the defendant. The error of their admission compels a reversal of the judgment.

Reversed and remanded.

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Prosecution for Refusal to aid Officer in making Arrest.

1. *Judicial acts of notary public as justice of the peace.*—To give validity to the official acts of a notary public as a justice of the peace, when he has the power of a justice of the peace, it is not necessary, though it would be proper, that he should add to his signature the words "*ex officio* justice of the peace," or other equivalent words. The courts and citizens of the State are presumed and bound to know who its commissioned officers are, and the extent of their authority.

2. *Pursuit and arrest under warrant, in another county.*—The statute which provides that an officer, having a warrant of arrest to execute, "may pursue the defendant in another county," and, on obtaining an indorsement of the warrant as prescribed, "may summon persons to assist him in making the arrest and exercise the same authority as in his own county" (Code, § 4656), does not mean that the execution must be begun in the latter county, when the defendant is there, and be followed up, in the event of his fleeing into another county.

FROM the Circuit Court of Greene, on appeal from County Court.

Tried before the Hon. L. R. SMITH.

The record and dockets do not show the name of the counsel who appeared in this court for the defendant.

H. C. TOMPKINS, Attorney-General, for the State.

MANNING, J.—Appellant was prosecuted for refusing to comply with the demand of one Carnathan, a special constable, to aid him in making an arrest, in Greene county, of one Peter Hill, in obedience to a warrant issued by a magistrate of Sumter county, requiring that said Peter be brought before him, upon a charge of larceny committed therein. Carnathan, deputed to act as constable in the absence of that offi-

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cer, had obtained from one McGowan, a notary public of Greene county, who acted also as justice of the peace, his indorsement upon the warrant, signed by him as "notary public" of Greene county, authorizing Carnathan to execute the warrant in the latter county. Appellant Coleman was informed of the authority under which Carnathan was acting. The objection chiefly insisted on here is, that McGowan, by signing the indorsement merely as notary public, acted and professed to act only as a notary public, and not as a justice of the peace; in which character alone, it is contended, he could confer the authority imported by the indorsement.

The constitution provides, "that the governor may appoint one notary public for each election precinct in counties, and one for each ward in cities of over five thousand inhabitants, who, in addition to the powers of notary, shall have and exercise the same jurisdiction as justices of the peace," &c. It is also provided, "that notaries public, without such jurisdiction, may be appointed."—Art. VI, § 26.

McGowan, as a notary public, was invested with the jurisdiction of a justice of the peace also; and however proper it would have been, it was not necessary, to give validity to his acts and precepts as magistrate, that he should add that title, or the words "*ex officio* justice of the peace," to his official signature as notary public. The citizens and tribunals of the State are presumed and bound to know who its commissioned officers are, and the extent of their authority; and it is of the highest importance to the community that they should be respected and obeyed as such, and supported in the performance of their respective legal duties. To the degree to which their authority is contemned and opposed, the peace and good order of society is disturbed, and the rights of individuals made insecure.

The clause at the end of section 1328 of the Code of 1876, in the following words: "and notaries public must otherwise qualify as justices of the peace," means that they must take the like oaths. It was previously enacted in this section, that notaries public must give bond as therein prescribed, the same in form and substance as justices of the peace were required to execute; and then the words above quoted are added, that they "must otherwise qualify as justices of the peace."—See the Acts of 1868, p. 20, from which these provisions of section 1328 of the Code are taken.

Section 4656, enacting that an officer, "having a warrant of arrest to execute, may pursue the defendant in another county," and, on obtaining an indorsement upon the warrant as prescribed, "may summon persons to assist him in mak-

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ing the arrest, and exercise the same authority as in his own county," does not mean, as contended, that the execution must be begun in the latter county, when defendant is there, and be followed up in the event of his fleeing into another county. And there was no error in the instruction given—that "if the party charged committed the offense in Sumter county, and a few days afterwards the warrant was issued, whilst the party was in Greene county, and the officer proceeded, in a reasonable time after, . . . to Greene county to make the arrest, this would be a pursuit within the meaning of the law."

Let the judgment of the Circuit Court be affirmed.

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Indictment for Carrying Concealed Weapons.

1. *Exception in favor of persons "travelling."*—The privilege of carrying concealed weapons, given by the statute to a person "travelling" (Code, § 4109), commences when he sets out on a journey, and continues until he reaches home on his return.

FROM the Circuit Court of Cherokee.

Tried before the Hon. JOHN HENDERSON.

The defendant in this case was indicted for carrying concealed weapons, and was tried on issue joined on the plea of not guilty. On the trial, as the bill of exceptions states, a witness for the prosecution testified, "that within twelve months before the finding of the indictment, and in said county, he met the defendant in the public road on the Garrett farm, on the opposite side of the Coosa river from defendant's home; that defendant drew from his pocket a pistol, which was concealed, and shot at a corn-stalk, and that defendant said he was on his return from Gadsden." The defendant's father testified, in his behalf, "that said defendant was between seventeen and eighteen years old, and resided with witness at his home in Centre, in said county; that he had started defendant on a collecting trip to 'Griffith's Mills,' which was beyond Gadsden, and in DeKalb county; that it was twenty-three miles from his home to Gadsden, and fourteen or fifteen miles from Gadsden to said mills; that the defendant knew a few persons in Gadsden," whose names the witness mentioned, "and had a sister residing

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there; that he had directed defendant to go to another place, ten or eleven miles below Gadsden, near 'Canoe Creek,' to see another party on some business; that defendant was out of the circle of his acquaintances when he had gone ten miles from home; that he had never been to Gadsden before, nor ten miles in that direction; that he had never been out on that sort of business before, and that he said, when he returned home, that he had only gone a few miles beyond Gadsden, and was prevented by high waters in the creeks from going the whole trip on which he was sent. This being all the testimony, the court charged the jury, among other things, that if they believed, from the evidence, that the defendant carried the pistol concealed, and was travelling, or on a journey which carried him beyond the circle of his acquaintances, or was on business not in his ordinary line of business, then he had a right, under the statute, to carry the pistol concealed; but, that when he came within a mile of home on his return trip, and where he knew the people, and within the circle of his acquaintances, if he carried it concealed as charged in the indictment, then he was guilty." This charge, to which the defendant excepted, is the only matter here presented for revision.

No counsel appeared in this court for the defendant, so far as the dockets show, and there is no brief on file.

H. C. TOMPKINS, Attorney-General, for the State.—The exception in the statute, in favor of travellers, is only co-extensive with the supposed necessity for protection against unknown dangers while among strangers, and ceases when the party has returned within the circle of his friends and acquaintances.—*Gholson v. The State*, 53 Ala. 519; *Eslava v. The State*, 49 Ala. 355. Besides, the exception is to the entire charge, a part of which is free from error, if not too favorable to the defendant.

STONE, J.—The statute (Code of 1876, § 4109) authorizes persons who are travelling to carry weapons concealed about their persons. Under the rule laid down in *Gholson's case*, 53 Ala. 519, we think the testimony in this case shows the defendant was travelling. His journey was expected and intended to carry him into two counties other than his own, "beyond the circle of his general acquaintance, and amongst strangers, for whose conduct he was in no wise responsible, either by his precept or example." He was none the less travelling, although on his return trip, and within a short distance of home. In such case, the privilege the statute

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gives to carry a weapon concealed about the person, commences when one is "setting out on a journey," and must be held to continue till he reaches home on his return trip. Till then he is travelling. The two charges asked and refused by the Circuit Court simply assert the proposition stated above, and the court erred in not giving them. There is nothing in *Eslava's case*, 49 Ala. 355, which conflicts with these views. That case simply holds that Eslava, while at the place of his daily avocation and business, could not claim the privilege the statute secured to travellers.

Reversed and remanded. The defendant will remain in custody, until discharged by due course of law.

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Prosecution for Failure to Work on Public Road.

1. *Prosecution before justice of the peace; sufficiency of complaint and warrant.*—In a criminal prosecution before a justice of the peace, technical accuracy in the description of the offense, either in the complaint or in the warrant, is not required: it is sufficient under the statute (Code, §§ 4647, 4651-2), as it would be without any statute, if the offense is designated by name only, or described by words from which it may be inferred.

2. *Failure to work public road; sufficiency of statement, or complaint.*—When the affidavit or complaint before the justice of the peace, by which the prosecution is commenced, charges the defendant with "the offense of failing to work the road," a statement, or complaint, filed in the Circuit Court on appeal, which charges that "he did willfully fail and refuse, after legal notice, to work the public road, either in person or by substitute, without a sufficient excuse therefor, and being liable to road duty," is not a departure; nor is it demurrable, because it does not describe the road, nor otherwise insufficient or defective.

3. *Evidence of list of hands for road duty.*—The list of hands for road duty, presented by the apportioners to the overseer, would not, if produced, be evidence of the defendant's liability to road duty, nor of any other material fact in the prosecution against him for failing to work the road; consequently, the fact that his name was on the list may be proved by oral evidence.

4. *Right to poll jury; when waived.*—In all criminal cases, whether of felony or misdemeanor, the right of polling the jury is secured to either party by the statute (Code, § 4910); but this right may be waived by the prisoner, in a case of misdemeanor, or it may be lost by the failure to assert it at the proper time; and it will be considered as waived, when his counsel consent, in his presence, that the verdict of the jury may be returned to and received by the clerk during a brief recess of the court, and it is so returned and received, and the jury discharged.

FROM the Circuit Court of Shelby.

Tried before the Hon. JOHN HENDERSON.

This prosecution was commenced before a justice of the peace, and was removed into the Circuit Court by appeal on

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the part of the defendant. The warrant of arrest, issued by the justice, charged the defendant with "the offense of failing to work the road;" and the offense was thus described in the affidavit, on which the warrant was founded. The complaint, or statement, filed in the Circuit Court by the solicitor, alleged that "Cecil Brown, within twelve months before the commencement of this prosecution, did willfully fail and refuse, after legal notice, to work the public road, either in person, or by substitute, without a sufficient excuse therefor, and being liable to road duty; against the peace," &c. The defendant moved to strike this statement from the files, on the ground, that it did not correspond with the affidavit and warrant by which the prosecution was commenced; and this motion being overruled, he demurred to the statement, assigning as causes of demurrer—1st, "that it did not sufficiently charge that the defendant had legal notice;" 2d, "that it did not specify or describe the said road." The court overruled the demurrer, and the defendant pleaded not guilty.

On the trial, as the bill of exceptions states, C. C. Wells was introduced as a witness on the part of the State, who testified, "that he was an overseer on the Selma and Montevallo road; that he knew the defendant, and had warned him to work the said public road, on the — day of —, 1877; that defendant did not appear, either in person or by substitute, at the place appointed for the road hands to meet, until about three o'clock in the afternoon, when one Henry Keenan appeared, with a hoe, and said he had come to work the road for said Brown; that he put said Keenan to work on the road, and he continued to work until the afternoon of the day before that on which the working of the road was completed, when said Keenan quit the road, and did not again return. The solicitor asked said witness, if the defendant's name was on his list of hands, furnished him by the apportioners; to which question the defendant objected, on the ground that the list was in writing, and was the best evidence of that fact, and that it was not proved to have been lost or destroyed; which objection the court overruled, and the defendant excepted; and the witness then answered, that the defendant's name was on his list. Said witness also testified, on cross-examination, that he did not inform defendant of the fact that his substitute had left the road, until the working on the road was over; and that he was not certain that he had himself warned defendant, but thought he had, as he had warned most of the hands, though he might have got some one else to warn him." On the part of the defendant an admission was introduced, as to the testimony of one

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George King and others, material witnesses, to the effect "that on the 10th September, 1877, defendant employed said King to work for him on said road, and furnished him with a hoe; that said King, at about 7:30 on the morning of that day, started down said road in view of defendant, in the direction of the place appointed by the overseer for the hands to meet; that just before reaching the place, he met Mr. Richard Steele, on whose place he was living, and who told him to go to the field and pick cotton; that said King thereupon changed his course, and went to the cotton-field, instead of working the road; and that said King did not at any time inform defendant of his failure to perform his contract to work the road for said defendant." Also, a similar admission as to the testimony of Henry Keenan, to the effect that, if present, he would swear "that defendant employed him to work said road on the 11th September, 1877; that he did work said road, as the substitute of said defendant, for one day and a half, and only left the road on account of being sick; and that he did not inform defendant that he was sick, and had left the road, until after the working of said road was over."

"This being all the evidence, the court charged the jury, 'that if the evidence satisfied them that defendant was liable to work the road, and that he had been legally warned to do so, and that he failed either to work, or to send a substitute in his place, in the absence of any excuse for the failure, the law presumes it was willful.' The court charged the jury, also, 'that the law allowed one liable to work the road to hire or send a hand to work in his place; and if the evidence satisfies them that defendant hired a hand to work in his place, and had good reason to believe that he was working in his place, and did believe so, then defendant would not be guilty of willfully failing to work the road; but, unless defendant did have good reason to believe that the person employed by him was working the road, it was his duty, either to work himself, or to see that his hand worked; and if he failed to do so, in the absence of a reason for doing so, the law presumes the refusal was willful.'" To each of these charges the defendant excepted.

"The papers in the case were then handed to the jury, and they retired to make up their verdict. It being about one o'clock, the court asked the counsel for defendant, if he would consent for the clerk to receive the verdict during the recess, in the absence of the defendant; and the counsel agreed that it should be so received. Thereupon, the court ordered an adjournment, or recess, for dinner, of one hour. The court was called at about two o'clock, and the clerk read the

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verdict. The defendant then asked the court to poll the jury, and the court ordered the sheriff to call the jury which had tried the case; and as the jury were coming into the jury-box, the court asked the solicitor, if he objected to the jury being polled at that time; and the solicitor objecting, the court refused to allow the jury to be polled. Several of the jury then asked the court, through an attorney, to allow them to change their verdict, which the court had not then recorded. The court refused to allow them to change their verdict, and the defendant excepted.

BOWDON & KNOX, for the defendant.—1. The affidavit on which the defendant was arrested and tried before the justice, charged no offense.—Code, §§ 1661, 4253; *State v. Brown*, 4 Porter, 412; 1 Chitty's Crim. Law, 172; *Noles v. State*, 24 Ala. 672; *Duckworth v. Johnson*, 7 Ala. 578; *Crumpton v. Newman*, 12 Ala. 199.

2. The statement filed in the Circuit Court was an entire departure from the affidavit, and should have been struck from the files. As an indictment, for which it is a substitute, it was demurrable for the causes specified.—*Brown v. Mobile*, 23 Ala. 722; *Francois v. State*, 20 Ala. 83; 1 Chitty's Crim. Law, 169; Archb. Crim. Pl. 40; *Graves v. State*, at present term.

3. The list of hands apportioned to the road was not only in writing, but was required by law to be in writing; and parol evidence of its contents ought not to have been received, without a proper predicate.—*Blackwell v. Thompson*, 2 Stew. & P. 348; *Wilson v. State*, 52 Ala. 299.

4. As to the error in the charge of the court, see *Smith v. The State*, 55 Ala. 11; 1 Greenl. Ev. § 44.

5. The right to poll the jury, in every criminal case, is secured by statute, and is a valuable right. The defendant had not waived that right, nor was it lost by the consent of his counsel that the verdict might be received by the clerk during the recess of the court.—*Hughes v. State*, 2 Ala. 102; *Brister v. State*, 26 Ala. 132; *Wright v. State*, 11 Ind. 569; *Fox v. Smith*, 3 Cowen, 23; *United States v. Potter*, 6 McLean, 186; 1 Bishop's Crim. Pro. 1003.

6. The jurors had the right to change their verdict, at any time before it was recorded, and the court erred in refusing to allow them to change it.—1. Bishop's Crim. Pro. § 1003; *Rex v. Parkin*, 1 Moody, 45; *State v. Austin*, 6 Wisc. 205.

H. C. TOMPKINS, Attorney-General, for the State.—1. In criminal proceedings before a justice of the peace, the same forms may be used as in the County Court, and technical accuracy is not required.—Code, § 4699. Besides, such cases are to

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be tried *de novo* on appeal, and the only question is the guilt or innocence of the accused.—Code, § 4722.

2. The statement filed in the Circuit Court is more definite and specific than that prescribed by the statute in the analogous case of an indictment against the overseer of a public road.—Code, § 4810.

3. That the fact of defendant's name being on the list of hands might be shown by oral evidence, see *McGehee v. Hill*, 1 Ala. 140; *P. & M. Bank v. Berland*, 5 Ala. 531; Phil. Ev. 303.

4. The charges to the jury were at least as favorable to the defendant as the law authorized, and he can not complain of them.

5. The right to poll the jury was lost, and the jurors themselves had no power to change their verdict.—3 Wharton's Amer. Crim. Law, § 3195.

BRICKELL, C. J.—There was no error in overruling the motion to strike the statement or accusation from the files. It did not depart from the warrant and complaint issued by the justice of the peace. These simply designated by name the offense with which the defendant was charged, and the designation satisfied the requirements of the statutes. Independent of statutory provision, technical accuracy in such proceedings, had before a justice of the peace, was not expected or required; and they were regarded as sufficient, whenever, upon a fair, reasonable construction of their language, a charge of a known criminal offense could be gathered.—*Crosby v. Hawthorne*, 25 Ala. 221. A complaint of the commission of a criminal offense, made before a justice, is now, by the statute, defined as "an allegation that a person has been guilty of a designated public offense" (Code of 1876, § 4647); and a warrant, issued upon it, is sufficient, if it designates the offense by name, or describes it, or if it employs terms from which the offense may be inferred.—Code of 1876, §§ 4651, 4652.

2. On an appeal from a judgment of conviction, rendered by a justice of the peace, the trial is *de novo*, and governed by the rules and regulations prescribed for trials of appeals from the County Court.—Code of 1876, §§ 4700, 4701. There is no indictment, or presentment by the grand jury. A brief statement, signed by the solicitor, of the cause of the complaint, stating the offense charged, is sufficient.—Code of 1876, § 4729. It is obvious that the statutes intend to dispense with the fullness and precision in describing the offense, which was necessary in an indictment at common law. In a great degree, they have reduced indictments to a bare designation of the offense charged, dispensing with averments

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of the facts constituting it. An overseer or apportioner of a public road may by indictment be charged, in general terms, with a failure to discharge his duties, and any acts or omissions, constituting a neglect of duty, may be proved on the trial.—Code of 1876, § 4810. The statement filed by the solicitor is fuller than would be an indictment found under this statute. It avers generally the facts which make up the offense, of which the defendant was convicted before the justice, and more fullness and precision of statement cannot be required, unless the statement, intended to be brief, is governed by different rules than prevail in reference to indictments.

3. The general principle, that oral shall not be substituted for written evidence of a fact, has no application, when the writing, if produced, would not be competent evidence of the fact to which it relates. If the list of hands, presented to the overseer by the apportioner, had been produced, it would not have been evidence of the liability of the defendant to road duty, nor of any other material fact in the case.

The instructions to the jury were as favorable to the defendant, as the facts would justify.

4. In all criminal cases, whether of felony, or misdemeanor, the right of polling the jury is secured to either party by statute. The statute reads: "When a verdict is rendered, and before it is recorded, the jury may be polled, on the requirement of either party; in which case, they must be severally asked, if it is their verdict; and if any answer in the negative, the jury must be sent out for further deliberation."—Code of 1876, § 4910. The Code of 1852 first introduced this provision.—Code of 1852, § 3604. The right of polling the jury, prior to the statute, depended upon the common law. In *Hughes's case*, 2 Ala. 102, it was held, in a case of felony, that it was the clear right of the prisoner to poll the jury, and the reception of a verdict of guilty in his absence was an error, of which he could take advantage when brought up to receive sentence, and which on error would reverse the judgment of conviction. In *Brister's case*, 26 Ala. 131, the case originating after the adoption of the Code, and which was also a felony, no reference is made to the statute; but the right of the prisoner to poll the jury was distinctly affirmed, on the authority of *Hughes's case*; and it was said, the reason his presence, when the verdict was rendered, was indispensable to support a judgment of conviction, was the right to examine the jury by poll, ascertaining whether each juror assented to the verdict. In *Waller's case*, 40 Ala. 332, a conviction of felony, without reference to the statute, it was held, that it was erroneous to allow the jury

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to return their verdict to the clerk, during a recess of the court, in the absence of the prisoner, though his counsel had in open court consented thereto.

There was much conflict of decision in the American courts, as to the right of a prisoner in any case, whether of felony or misdemeanor, to poll the jury; some authorities affirming the right, and others declaring that it depended upon the discretion of the court. There is a very full collection of them in an interesting article, under the title *Polling the Jury*, in the first number of the new series of the Southern Law Journal and Reporter. The statute was intended to establish the right in all criminal cases, removing any doubt and uncertainty as to its existence. It is a right, which, however, like the right of trial by jury, may be waived by the prisoner in cases of misdemeanor; and in any case, it may be lost, by the failure to assert it at the proper time.

The consent given in this case was, that if the jury agreed upon their verdict, during a brief recess of the court, it should be returned to, and received by the clerk, in the absence of the defendant. The verdict, under this agreement, was returned to, and received by the clerk, and the jury discharged. Nothing less can be intended from the consent, than that the verdict, if returned to, and received by the clerk, during the recess of the court, in the absence of the defendant, and the jury discharged, should be of the same validity and operation, as if all this had occurred in open court, and in the presence of the defendant. It is unlike a case in which the jury return to the clerk, by consent, a sealed verdict, which can be opened, and its contents made known, only in the presence of the defendant, and of the court, and by its authority. The consent, to have any effect, must have the construction we have indicated. If the verdict had been of acquittal, it would be scarcely insisted that the State had not lost the right of polling the jury; and its right is coequal and coextensive with that of the accused under the statute. There seems to us as little room for doubt, that the accused must be held to have lost the right, or, rather, to have waived it, and to have intended to waive it. What else could have been intended, where the consent extends to the delivery of an open verdict to the clerk, in the absence of the accused, to be followed by a discharge and dispersion of the jury, which he must have known would be consequent on the rendition of the verdict? There could be no polling of the jury in his absence, and none after their discharge and dispersion. When the verdict is returned, and received by the court, and the jury discharged, a memorandum of it is made, from which the record is subsequently made up. The memorandum is

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the record, to which the statute refers ; and that, it must be intended, the defendant consented should be made in his absence. Agreements deliberately made, as to the conduct and proceedings in the cause, with the sanction of the court, should be enforced according to their spirit and meaning, against defendants in criminal, as well as against suitors in civil cases. No just, discreet judge would permit, by agreement, extravagant departures from the usual mode of proceeding, or which placed the defendant in peril of a fair and impartial trial. Provisions of law, intended alone for his benefit, he may often, for his own convenience, waive. Secondary may, by his consent, be substituted for primary evidence. Admissions of the evidence of absent witnesses he may make, rather than submit to a delay of the trial until the witnesses can be personally produced. Papers, constituting a part of the files, may, if lost, be substituted with his consent, without waiting a personal application, preceded by notice to him. There is little room for distinguishing between the capacity to consent, and to waive, in civil and in criminal cases, as to all matters which pertain merely to the conduct of the trial. The accused is attended with counsel, who are capable of advising him ; and has the additional protection of the court, which would never sanction any agreement, that would operate practically to injure him ; and if such was its operation, would not hesitate to relieve him from it. The consent was given by the counsel ; but it was in the presence of the defendant, and without dissent on his part. The opportunity of a verdict of acquittal was obtained by it, and it is too late for him now to dissent, because the verdict is adverse.

We do not intend departing from *Waller's case*, which was a conviction of felony. But when, in cases of misdemeanor, the defendant, through his counsel, deliberately consents that, in his absence, the jury may return a verdict, and be discharged, he waives, and must intend to waive, his right of polling them. Polling would become a hindrance to the administration of justice, and cast upon it reproach, if it could be exercised after a discharge of the jury, and after the publication of their verdict, when, without offending the order of the court, they could be approached, and tampered with. Tampering may be corrupt, or it may be by appeals to the sympathy of individual jurors, when corruption cannot be imputed. From it in any form the jury is guarded while under the control of the court. After their dispersion, the court loses control over them, and cannot again remit them to their deliberations.

We find no error in the record, prejudicial to the defendant, and the judgment must be affirmed.

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Indictment for Murder.

1. *Relevancy of evidence showing feelings of deceased towards accused.* — Where the deceased was slain by the accused in a personal combat in the dark, both being freedmen, and no witness being present; and it was shown that the accused had been living in a state of fornication with the daughter of the deceased, but had just married her, and the fact of the marriage had just been communicated to the deceased, who had made threats against the accused if he did not marry her; *held*, that the accused should be allowed to prove, in rebuttal, that the deceased was in fact opposed to his marriage with the girl, and was himself living in adultery with her, although she was his daughter.

FROM the Circuit Court of Tuscaloosa.

Tried before the Hon. WM. S. MUDD.

The prisoner in this case, who was a freedman, was indicted for the murder of Tom Isham, who was also a freedman; and on his trial he reserved the following bill of exceptions, on which the case is brought to this court, to-wit: "The State introduced several witnesses, whose testimony tended to prove that, on the night of the 2d April, 1878, in the county of Tuscaloosa, Tom Isham, a colored man, was killed by the defendant, under the following circumstances: The defendant, about 9 o'clock P. M., had just been married to a negro girl named Keziah, who was the daughter of the deceased, at a house situated about four or five hundred yards from the house of the deceased; and the married couple rode on horseback, in the direction of the defendant's house. They stopped in the public road, about fifty or seventy-five yards from the house, and the girl went in to get her clothes, after which she returned; whereupon, the deceased, on learning the fact of her marriage, came out of his cabin, and went in the direction of the defendant, crossing the fence. Words ensued, which indicated that a combat was progressing in the dark; and the said Tom Isham was killed in the rencontre, being stabbed in the throat with a knife, apparently a large pocket-knife. A chestnut rail was found in the road, partially broken about four feet from one end, and similar to the rails on the fence near the gap at which the deceased probably crossed in going towards the defendant. The evidence tending to show who used the rail, whether the defendant or the deceased, was conflicting; but facts were in proof, tending to show that it might have been either the one or the other. Some violent threats, on several occasions,

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were proved to have been made by defendant against the deceased, and they were shown to have been previously very unfriendly, if not hostile to each other. The State introduced evidence to show that, about two days before the killing, threats had been made by the deceased to have the defendant arrested for living in adultery with, and otherwise maltreating said Keziah (his daughter); and that a quarrel, or difficulty, had taken place between them about the matter; and that the deceased insisted on defendant marrying her; and that defendant said, on one occasion, that he would marry her and put an end to this 'fuss and growling.' The defendant offered evidence tending to show that the said Tom Isham was, and had been, living in adultery with the said Keziah, and was opposed to her marrying defendant; and the purpose of this evidence was to show a jealousy on the part of the deceased against defendant, on account of said marriage. The solicitor for the State objected to this evidence, and the court sustained the objection, and excluded the evidence; to which the defendant excepted. This was all the evidence."

H. M. SOMERVILLE, and S. A. M. WOOD, for defendant.

H. C. TOMPKINS, Attorney-General, for the State.

MANNING, J.—The conflict between appellant and Tom Isham, whom he slew, occurred at night; and no one appears to have been able to explain how it began. They were both negroes, and their quarrel seemed to have grown out of their relations with Keziah, a daughter of Tom, with whom appellant, defendant in the Circuit Court, had been living in illicit intercourse, and whom he had married at a house four or five hundred yards distant from that in which Tom Isham lived, just before the fatal rencontre between the two men took place. Defendant and Keziah were, it seems, on their way from the house where they had been married, to some other place, to which they were going on horseback; and passing along the road by Tom's house, they stopped at, and Keziah entered it, to get her clothes; and when she came out, after having, perhaps, told her father of the marriage, he came out also, and crossing a fence around his house, "went in the direction of defendant." "Words ensued which indicated that a combat was progressing in the dark." Tom was killed, "being stabbed in the throat by a knife." A broken rail, also, was found near the spot; but "the evidence tending to show who used the rail, whether defendant or deceased, was conflicting."

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Evidence, on the part of the State, tended to show that two days before that time, deceased had threatened to have defendant "arrested for living in adultery with and otherwise maltreating the said Keziah (his daughter), . . . and had insisted on defendant marrying her, and that defendant had said, on one occasion, that he would marry her and put an end to this 'fuss and growling.'"

In defense, testimony was offered "tending to show that the said Tom Isham was, and had been, living in adultery with said Keziah" (his daughter), "and was opposed to her marrying defendant," the purpose being to produce the belief that he was moved by jealousy on account of the marriage.

We think that, under the circumstances, this evidence should have been admitted. The testimony for the State tended to show, on the part of deceased, a natural and just indignation at the disgrace brought by defendant upon his daughter, and a desire that reparation for it should be made by their marriage; which having been effected, the jury might infer that the feelings with which deceased went to defendant were probably friendly, instead of hostile, and that the conflict, therefore, was brought on by defendant, in pursuance of the threats which, according to the evidence, he had previously made, and to gratify the animosity he had before expressed. The deliberations of the jury in this matter ought to have been made with correct information of all the facts relating to it. As the State's witnesses had testified that deceased desired and insisted on the marriage, which had taken place, defendant should have been permitted to prove to the contrary, that deceased was opposed to, and exasperated by it, and the reason why, if such was the fact. It was almost immediately after that event, apparently as a consequence of it, and when deceased first heard of it, that the conflict in the dark took place. And it not having been seen by any witness who testified, how it was brought on, all the facts and circumstances connected with and leading up to the rencontre in which Tom was slain, should have been submitted to the jury, for the purpose of enabling them to determine correctly the degree and nature of defendant's responsibility.

We do not mean to intimate that, if the testimony excluded had been submitted to the jury, they ought to have been influenced by it to bring in a verdict less severe. It is for them alone, upon a consideration of all the evidence, according to the law, to be explained to them by the presiding judge, to determine the degree of defendant's guilt; and we think the excluded testimony tended to prove facts so bear-

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ing upon the transaction and relevant to the case, as to entitle defendant to be allowed to submit it to the jury.

Let the judgment be reversed, and the cause be remanded, and the defendant remain in custody until discharged by due course of law.

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Indictment for Wanton Injury to Cattle.

1. *Averment as to ownership of property, in different counts; election.*—In an indictment for wanton injury to stock, or other similar offense, if there is any doubt as to the ownership of the property, it may be laid, in two or more counts, in different persons; and in like manner, when the identity of the owner is known, but there is a doubt as to his true name, it would not be improper, though probably unnecessary, to aver it in different forms, in separate counts. But, when the ownership is laid in two or more persons, in separate counts, and the evidence adduced on the trial discloses two or more distinct offenses, one applicable to each count, a case of election is presented, and there can be a conviction of only one offense.

2. *Form of judgment on conviction, where part of fine goes to person injured.* In a criminal prosecution under a statute which gives one-half of the fine to the prosecutor, or person injured (as under Code, §§ 4409-10), judgment should, on a conviction, be rendered in favor of the State, for the use of the county, for the whole amount of the fine, to be collected as other fines on convictions of misdemeanor. There is no authority for a severance of the judgment, nor for the award of execution as in civil cases.

3. *Unlawful or wanton killing or injury to cattle, &c.; amount of fine; damage feasant as defense.*—Under the statute prohibiting and punishing the unlawful or wanton killing or injuring of stock, &c. (Code, §§ 4409-11), it is provided that the defendant, on conviction, "shall be fined not less than twice the value of the injury," &c.; yet the statute declares also, that if the cattle were at the time doing damage to a growing crop, in a field inclosed by a lawful fence, that fact may be shown "in extenuation or justification of the injury, as the jury may determine;" and the effect of this evidence may be to reduce the fine, at the discretion of the jury, below the minimum fixed by the statute.

4. *Same; same*—To make this defense available, it is not necessary for the defendant to show that the owner of the stock pulled down his fence, and turned the cattle on his growing crop.

FROM the Circuit Court of Sumter.

Tried before the Hon. L. R. SMITH.

The indictment in this case contained two counts; the first charging that the defendant "did unlawfully and wantonly kill, destroy, or injure an ox, the personal property of William H. Saunders;" and the second, that he "did unlawfully or wantonly kill, destroy, or injure an ox, the personal property of William H. Saunders, jr." The defendant demurred to the indictment, because it did not aver the value of the ox, and because it did not aver the value or amount of the

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injury; but the court overruled the demurrer, and he then pleaded not guilty. On the trial, as appears from the bill of exceptions, the evidence adduced by the State showed that two oxen had been killed, by being shot, one belonging to William H. Saunders, and the other to William H. Saunders, jr., who was his son; and the evidence tended to show that they were purposely killed by the defendant, because they trespassed upon and damaged his growing crop of corn, which was in a field adjoining the pasture of said W. H. Saunders, where the oxen run with his other cattle. It was shown that the field was situated within the district where the stock law was of force; that the fence inclosing the pasture was old and rotten, and was found pulled down, or had fallen of its own weight, leaving a gap through which the cattle strayed into the field; but, as to the condition of the fence at that point, whether it appeared to have been pulled or thrown down, or to have fallen of its own weight, there was some conflict in the evidence. The field adjoining the pasture belonged to one Gould, in whose employment the defendant was working as a laborer in making the crop; and said Gould testified, on the part of the defendant, that Saunders's cattle were in the habit of trespassing on his crops, and had caused him much damage; that he had frequently complained to Saunders about the cattle, and had been told by him to shoot them if he could not keep them out of his field. Other witnesses testified to the same effect, as to the trespassing and damage done by the cattle, the complaints about it in the neighborhood, and the permission given by Saunders to kill them. Saunders testified, that the oxen were worth \$75; while the evidence for the defendant showed, "that the value of a pair of oxen ranged from \$30 to \$60." This is about the substance of the evidence, all of which is set out in the bill of exceptions. "The court charged the jury, among other things: 'It is only in cases of necessity that a person is justified, under this law, in shooting stock trespassing on his crops. I will illustrate by an example. If your neighbor were to pull down his fence, and turn his stock in on your crop, then you would be justified in shooting them. If the defendant shot this stock without its being necessary, he would be guilty as charged.'" The verdict and judgment are set out in the opinion of the court.

CHAPMAN & SMITH, for the defendant.—1. The indictment should have alleged the value of the stock, or the extent or amount of the injury to them, since this is by statute made the basis of the fine. The prosecution is partly for the benefit of the person injured, and is a quasi-civil proceeding,

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as in the analogous case of larceny.—*Garner v. The State*, 8 Porter, 447.

2. If stock is injured while doing damage to a growing crop, this fact shall be received in evidence on the trial, by the express words of the statute, "in extenuation or justification of the commission of such injury, as the jury may determine." But the charge of the court limited this defense to cases of necessity. Necessity will justify or extenuate any act, even the taking of human life, and is not within the operation of this statute.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The indictment in the present case is framed under section 4409, Code of 1876. It contains two counts. The first charges, that the accused "did unlawfully and wantonly kill, destroy, or injure an ox, the personal property of William H. Saunders." The second employs the language, "did unlawfully or wantonly kill, destroy, or injure an ox, the personal property of William H. Saunders, jr." This form of presentment is proper, if not necessary, when a doubt exists as to the ownership of the property, alleged to have been killed or injured. It would not be improper, but probably unnecessary, if the two counts were intended to charge the property in the same person, and a doubt existed whether he was called and known as William H. Saunders, or William H. Saunders, jr. Under our system of pleading, an addition, or suffix to a proper name, is not necessary.

But the evidence in this case proves that William H. Saunders and William H. Saunders, jr., are two persons, father and son; and the tendency of the proof is, that two oxen were killed; one the property of the father, and the other the property of the son. There was a general verdict of "guilty as charged in the indictment," fixing "the value of the oxen at fifty dollars," and assessing the fine at one hundred dollars. The court thereupon adjudged, "that the State of Alabama, for the use of Sumter county, recover of the defendant the sum of fifty dollars, the fine assessed by the jury against Wm. Bass, together with the costs in this behalf expended, and for which execution may issue. It is further considered and adjudged by the court, that W. H. Saunders, sr., recover of Wm. Bass the sum of twenty-five dollars, being one-half the value of the oxen, together with the costs in this behalf expended, and for which execution may issue. It is also considered by the court, that Wm. H. Saunders, jr., recover of Wm. Bass the sum of twenty-five dollars, one-half the value of the oxen, together with the

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costs in this behalf expended, and for which execution may issue." This was a parcelling of the verdict, rendering three judgments in favor of three separate persons, for the several parts of a gross finding by the jury; and in each of the cases there is a judgment, and execution ordered, for the costs in this behalf expended. This, of course, includes the whole costs, for there was but one prosecution. The result is, that there are three judgments rendered, each for the whole costs.

A second noticeable feature of this case is, that while the verdict of the jury is general, and does not ascertain the separate values of the oxen, the judgment assumes that the values were equal, and so awards to each owner of the property destroyed an equal part of the fine assessed. Third, the judgments rendered in this case are in the form of judgments in civil suits, to be enforced by common writs of *fieri facias*, instead of the rule applicable to State prosecutions. Now, while on a conviction in this case, one-half the fine will go to the owner of the animal injured, under section 4410 of the Code, this does not authorize a severance of the judgment. The judgment should have been rendered in favor of the State of Alabama, for the use of Sumter county, for the whole finding of the jury, to be collected as other fines are collected, on convictions of misdemeanor. The division of the money comes afterwards.

This, if the only error in the record, might be here corrected, and the proper judgment rendered. But another error was committed on the trial, which it is our duty to notice.—Code of 1876, § 4990. We have shown above that the present indictment is good, and that it is not a misjoinder of counts when, in one count, the property is averred to be in one person, while in the other, it is averred to be in a different person. But when, as in this case, the several counts charge several and distinct offenses, in unlawfully and wantonly killing the separate property of two or more persons, the indictment, not only in form, but in substance, charges more offenses than one. In such case, the offense charged being a misdemeanor, there can not be a conviction of more than one of the offenses. The doctrine of election applies in such cases.—*Wooster v. The State*, 55 Ala. 217. Applying this principle to the present case, the accused can not, under this indictment, be convicted of killing more than one of the oxen.

The statute under which this indictment was found, approved February 3d, 1877 (Pamph. Acts, 136), creates a misdemeanor, out of what had theretofore been a civil trespass. Code of 1876, §§ 4409, 4410, 4411. The third section of the act, constituting the section of the Code last named, pro-

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vides, that "if the stock named in the second preceding section is injured while doing damage to any growing crop inclosed by a lawful fence, or, where stock laws prevail, the fields of which are cultivated without a fence, and the animal injured has broken over said fence, or entered upon such lands and trespassed upon the crop, the evidence of this fact shall be received upon the trial, in extenuation or justification of the commission of such injury, as the jury may determine." The section referred to as 'second preceding,' is 4409 of the Code. That section declares, that any offender against its provisions must "be fined not less than twice the value of the injury," &c.; and section 4410 declares, that "one half of the fine shall go to the owner of the property." Section 4411 provides what shall be received in evidence (enumerated above) "in extenuation or justification of the commission of the injury." Now, evidence of the facts enumerated, if given, would be authority for the jury, if they so determined, to reduce the fine below the minimum declared in section 4409, or to acquit the defendant altogether. Such is the import of the language, "in extenuation or justification." It is a question entirely for the jury to determine, to what extent, if any, the offense is extenuated, or whether or not it is excused by such facts. If the jury determine that the act is excused by the trespass the stock is committing to a growing crop, and on that account acquit the defendant, they only do what the statute empowers them to do. So, if for the same reason, the jury determine the offense is extenuated, and they assess a fine at less than "twice the value of the injury to the animal," they are within the terms of the statute. When parties, whose stock has been killed or injured while trespassing on another's growing crop, elect to proceed by indictment under this statute, rather than by a civil action of trespass to redress the grievance, they take upon themselves the risk of having the jury extenuate or excuse the offense, if the facts bring the case within the terms of § 4411, copied above. It is a question of enlightened discretion for the jury, which they should exercise for the public welfare, in view of all the attendant circumstances.

Under these rules, the charge of the court excepted to can not be vindicated. The effect of that charge was, that unless the owner of the stock pulled down the defendant's fence, and turned his stock on the defendant's crop, then the defendant would be guilty as charged, if he killed the oxen. This is not a fair interpretation of the statute, as we have shown above.

Reversed and remanded. Let the defendant remain in custody, until discharged by due course of law.

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Indictment for Carrying Concealed Weapons.

1. *Admission as to testimony of absent witnesses.*—On application for a continuance in a criminal case by the defendant, on account of the absence of material witnesses, the court may, in its discretion, require the State to admit the truth of the facts proposed to be proved by the absent witnesses, or simply to admit that the witnesses, if present, would testify to the facts as stated; but, whether the admission be in either form, it is equally conclusive for the purposes of the trial.

2. *Same*—If one of the absent witnesses should come into court, and be examined during the trial, a contradiction, or inconsistency, between his testimony and the admission as to what his testimony would be, is immaterial, and cannot be considered by the jury in determining the effect of the admission as to the testimony of the other absent witnesses.

FROM the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The defendant in this case was indicted for carrying concealed weapons. On his trial, as appears from the bill of exceptions, the State introduced as witnesses two police officers of the city of Montgomery, who testified, in substance, that the defendant was arrested for disorderly conduct on a day named, and carried to the head-quarters of the police; and that, on searching him, they found a pistol concealed about his person, being carried in a belt around his waist, under his coat and vest. The defendant then offered in evidence an admission by the State as to the testimony of several absent witnesses, on account of whose absence the defendant had asked a continuance, stating in his affidavit what he expected to prove by them; "which was admitted by the State, to the effect that said witnesses, if they were present in court, would testify to the matters therein set forth." The substance of the testimony of these witnesses, as stated in the affidavit, was to the effect that, a short time before the defendant's arrest on the occasion mentioned, they had heard threats made against him by certain persons, with whom he had had some trouble, caused by their disorderly conduct at a church meeting, had communicated these threats to the defendant, and saw him carrying his pistol openly and unconcealed at the time of his arrest by the police officer. One of these witnesses was named Harriet Reddick, who appeared in court during the trial, "after said showing was made," and testified that, on the day mentioned, she saw the

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defendant about the middle of the day, with the pistol belted around, displaying the handle, but that she did not see him at the time of his arrest; also, to the threats, &c., as stated in the affidavit. In reference to this inconsistency in the testimony, the court charged the jury as follows: "If the jury find that a material part of the defendant's affidavit, in evidence in this case, has been contradicted by one of the witnesses named in said affidavit, then the jury may look at this contradiction, in connection with all the evidence in the case, as to whether or not they will give credence to any portion of said affidavit." To this charge, with others, the defendant excepted.

J. GINDRAT WINTER, for the defendant.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—The continuance of causes, civil or criminal, rests in the sound discretion of the primary court, and its action will not be revised on error. When, without laches on his part, the defendant in a criminal case is not prepared for trial, because of the absence of witnesses, the practice has been, if there is no reason to suspect that delay is the object, on an affidavit of the facts, which discloses the materiality of the evidence, to grant a continuance, or to put the State on an admission of its truth, or an admission that the witnesses, if personally present, would testify to the facts stated. The court, in its discretion, may adopt either course, as the particular circumstances may disclose that the one or the other is the more promotive of the ends of justice. If an admission of the truth of the evidence is made, no evidence in contradiction of it can be received. But if, as in the present case, the admission is simply that, if the witnesses were personally present, they would testify to the facts stated, evidence in contradiction must be received. The affidavit of the facts the witnesses would prove, stands in the place, and is the substitute for the oral testimony, the witnesses would give if personally present. The witness being personally present, the evidence given by him would be subject to contradiction, and the substitute for that evidence is equally open to contradiction, unless the State has been compelled to an absolute, unqualified admission of its truth.—*Starr v. The State*, 25 Ala. 49; *Olds v. Commonwealth*, 3 A. K. Marsh. 467.

But it is the evidence of the witnesses, and not the truth of the affidavit, that if personally present they would testify as stated, which is open to contradiction. The State admits

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conclusively the truth of the affidavit—admits conclusively, that the witnesses, if present, would give the evidence; and whether they would give it or not, can never become an inquiry for the jury. The City Court manifestly erred, in instructing the jury that, if a material part of the affidavit for a continuance had been contradicted by one of the witnesses named in it, they could look to such contradiction, in determining whether they would credit any part of it. The State had admitted the witnesses would testify as stated in the affidavit; and whether the admission was true in fact, or not, the jury could not inquire. Its force and effect as to the absent witnesses could not be lessened or qualified, because, during the progress of the trial, one of these witnesses appeared, and did not give the evidence supposed. The only effect of his appearance and testifying was to blot out the admission as to his evidence, leaving it of full force as to the witnesses who did not appear. The inconsistency of the evidence it is admitted the absent witnesses would give, with the other evidence in the cause, is a fact which the jury may consider in determining its credibility and weight; as the inconsistency of the other evidence with that of the absent witnesses is to be considered, in determining its credibility and weight. To avoid a continuance, the State voluntarily admitted, that the absent witnesses, if personally present, would testify to the facts stated; and that admission was binding upon it, throughout the progress of the trial.

This error compels a reversal of the judgment. It is not necessary to discuss the other instructions to which exceptions were reserved.

Reversed and remanded. The prisoner will remain in custody, until discharged by due course of law.

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Indictment for Burglary.

1. *Sufficiency of indictment, in description of building broken and entered.*—An indictment which charges that the accused broke and entered "a gin-house, the property of W. R., in which was kept, for use, sale, or deposit, seed-cotton, a thing of value," &c., is sufficient, without an additional averment that the gin-house was specially constructed for the use to which it was applied. Under the statute (Code, § 4343), only structures of a temporary character, erected for special purposes or occasions, require such additional descriptive averment.

2. *Burglary; breaking and entering.*—The two rooms of a gin-house, which

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had not been used as such for two years or more, being separated by a partition in which an opening was left, not for ingress or egress, but for the passage of the cotton from the gin (when running) into the lint-room; and being used and occupied by two different persons, each having the key to the door of his own room; if one of them enters the room of the other, through the said opening, with the intent to steal his seed-cotton stored therein, he is not guilty of burglary, though he opened and entered the door of his own room, with the intent to pass through the opening and steal the cotton in the other room, and carried his intent into execution.

FROM the Circuit Court of Talladega.

Tried before the Hon. JOHN HENDERSON.

The defendant was indicted under the statute against burglary, which is in the following words: "Any person who, either in the night or day time, with intent to steal, or to commit a felony, breaks into and enters a dwelling-house, or any building, structure, or inclosure within the curtilage of a dwelling-house, though not forming a part thereof; or into any shop, store, ware-house, or other building, structure, or inclosure in which any goods, merchandise, or other valuable thing is kept, for use, sale, or deposit, provided such structure or inclosure, other than a shop, store, ware-house, or building, is specially constructed or made to keep such goods, merchandise, or other valuable thing, is guilty of burglary," &c. The indictment charged, in a single count, that the defendant "broke into and entered the gin-house of William R. Stone, in which was kept, for use, sale, or deposit, seed-cotton, a thing of value, the property of William Roberson, with the intent to steal; against the peace," &c. The defendant demurred to the indictment, but the record does not show what causes of demurrer, if any, were specially assigned. The court overruled the demurrer, and the defendant then pleaded not guilty; on which plea issue was joined, and a trial had.

On the trial, as appears from the bill of exceptions, the State introduced William Stone as a witness, who was the owner of the gin-house alleged to have been broken and entered, and who thus described it: "It was an old-fashioned gin-house, set up on props some feet from the ground, with two rooms to it; one of which had formerly been used as a lint-room, and the other as a gin-room. At the time of the alleged breaking, one of the rooms (the lint-room), which was a long, narrow room, was in the possession, and under the control of William Robinson (?) a tenant on the place of witness, who used the same for the purpose of storing his (Robinson's) cotton therein. This room had a window in one end, fastened on the inside with a wooden pin; and it also had a door at one side, which was kept locked, and William Robinson carried the key. At the time of the

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alleged breaking, said Robinson had a considerable quantity of seed-cotton stored in the end of the room opposite from the end containing the window. It was piled up in a regular and orderly way. At the time of the alleged breaking, Robinson was using said room as a cotton-room. Witness had not himself used the gin-house for several years prior to that time. The other room, which had formerly been used as a gin-room, was opposite to the lint-room, and separated from it by a partition, making each a separate and distinct apartment. This room also had a door opening out into the gin-house lot. It was in the possession, and under the control of defendant, who was also a tenant on witness' place, and who used the same for the purpose of storing his cotton therein. At the time of the alleged breaking, defendant was using this room as a cotton-house, had cotton stored therein, and carried the key to the door opening into said room. The partition between the two rooms was a solid one, with no door or window therein; but there was a hole in it, large enough for a man to crawl through, which was made in the partition wall for the purpose of permitting the cotton to pass from the gin, when it was used for that purpose, down into the lint-room."

William Robinson, as a witness for the State, testified to the loss or larceny of his cotton from the lint-room, and described the appearance and condition of the room when he examined it, in November, 1876, a day or two after the larceny; the appearances indicating that the cotton had been carried to the window and through it, where it was put into a wagon, which was then driven off; and in these particulars his testimony was corroborated by the former witness (William Stone), who was with him at the time. "Said Robinson testified, that he kept the window fastened from the inside with a wooden pin, and also kept the door locked, and carried the key himself; that the last time he left his cotton-house, before he missed any cotton, he fastened the window securely on the inside, and locked the door as usual; that when next he saw it, and missed the cotton, he found the door locked as usual, but, on closer investigation, found that the wooden pin holding the window had been removed, and the window was unfastened; that there was a hole in the partition between his cotton-house and the defendant's, large enough for a man to crawl through easily; that the defendant carried the key to his own cotton-house, which had a door opening into the lot." This witness also stated facts strongly tending to show that the defendant was the person who had entered the room by night and carried off the cotton; and in these facts he was corroborated by the testimony

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of other witnesses. The only evidence offered by the defendant tended to prove an *alibi*.

"The above being all the evidence in the case, the court charged the jury, *ex mero motu*, as follows: 'If the jury believe, from the evidence, that the defendant had the possession and control of the cotton-house adjoining that of Robinson, and entered his own cotton-house, by means of a key which he carried, with the intent to steal, and then crawled through the hole in the partition between the two houses, and, after being in Robinson's cotton-house, opened the window from the inside, and stole and carried away Robinson's cotton; then the law would consider the unlocking and entering through his own door a sufficient breaking to constitute a burglary, if the other elements of the offense are made out to the satisfaction of the jury beyond all reasonable doubt.' To this charge, and to each separate part thereof, the defendant excepted"; and he then requested the court to instruct the jury, in effect, that if the defendant had control of the room adjoining Robinson's, and entered Robinson's room through the hole in the partition, and opened the window of this room from the inside, and carried away the cotton through the window, this was not such a breaking as would constitute burglary. The court refused to give this charge, and the defendant excepted to its refusal.

BOWDON & KNOX, for the defendant.—1. A gin-house is not *ejusdem generis* with shop, store, or warehouse; and hence, to constitute the offense denounced by the statute, it must, by proper averment, be brought within the terms of the proviso.—Code, § 4343; *State v. Raiford*, 7 Porter, 101; *Johnson v. State*, 32 Ala. 583.

2. There was a fatal variance between the averment and proof, as to the ownership of the building, or room, said to have been broken and entered. The ownership should have been laid in Robinson.—2 Russell on Crimes, 3d Amer. ed., 30; 2 Wharton's Crim. Law, §§ 1586-7; 2 East, P. C. § 500; *Webb v. State*, 52 Ala. 422.

3. The court erred in the charge given, and in the refusal of the charge asked. The defendant was not guilty of any offense in opening the door and entering his own room; and if he afterwards entered Robinson's room, through the hole in the partition, though with the intent to steal his cotton, this was not a breaking in law, and he was not guilty of burglary.—4 Bla. Com. 226; 2 Russell on Crimes, 2-3, 27, 31; 1 Hale's P. C. § 554; 2 East's P. C. c. 15, p. 506; 2 Bishop's Crim. Law, §§ 109-11; 2 Wharton's Crim. Law, § 1591.

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H. C. TOMPKINS, Attorney-General, for the State.—1. A gin-house is a “building” within the words of the statute, and is not a “structure or inclosure” within the terms of the proviso. Hence, no additional descriptive averment of it was necessary in the indictment.

2. The aperture in the partition wall between the two rooms was necessary for the purposes for which the building was erected; without it the building could not be conveniently used as a gin-house. It was as necessary as a chimney in any other house; and an entry through it, with intent to steal, was in law a breaking.—*State v. Willis*, 7 Jones, N. C. 190; Clark’s Manual, §§ 839–41, and cases cited.

MANNING, J.—A gin-house is not one of those *structures or inclosures*, “other than a shop, store, warehouse, or building,” which may be the subject of burglary, according to section 4343 of the Code of 1876, only when “specially constructed or made to keep such goods, merchandise, or other valuable thing,” as must be contained therein at the time of being broken into with a larcenous or felonious intent. A gin-house is an edifice which, like a barn, is of a permanent and substantial kind, and is well known in communities where cotton is grown, as the building to which seed-cotton is carried from the field, and where the seeds are separated by the machine called a gin, from the lint, or wool. It was, therefore, not necessary it should be described in the indictment as “specially constructed or made,” for the use to which it was put. The *structures* that must be thus described, are those of a temporary character, erected for special purposes or occasions. The demurrer to the indictment was, therefore, properly overruled.

2. The two rooms of the gin-house, which was no longer used for the ginning of cotton, were externally accessible through separate doors; and in the partition between them, there was no opening intended to be used for ingress and egress. But the hole in it, through which the lint-cotton was expelled from the gin, when that should be in operation, was intended to pass, was large enough to permit a man to crawl through. No such breaking as is requisite to constitute burglary was, therefore, committed in a man’s passing through this hole from the gin-room, which was in the lawful control of Robinson, and of which he had the door-key. It could not be regarded like the case of an entering by a chimney, because a gin had not been used in the building for two or more years, and the two rooms were now put to separate uses, and in charge of different persons.

Nor was defendant guilty of burglary—house-breaking—

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by opening the door of the room of which he had the key and lawful use, and entering therein, though he did so with the intent to pass through the hole mentioned, and did pass through it, into Robinson's room, and steal thence his cotton. He could not commit the offense of house-breaking, by entering the part of the house of which he had the use and control, though he did so to enable him the better to commit a larceny of the property of another person. It is for the larceny he should, in such a case, be indicted.

Let the judgment of the Circuit Court be reversed, and the cause remanded. The defendant must remain in custody, until discharged by due course of law.

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Indictment for Wanton Injury to Stock.

1. *Indorsement of prosecutor's name on indictment.*—Although the statute declares that, for the unlawful or wanton killing disabling, or injuring certain animals named, “no bill of indictment shall be found, or prosecution maintained, except upon the complaint of the owner of the stock, or his lawful agent” (Code, §§ 4409–10); yet it does not require the record to show affirmatively that the complaint was made by the owner, or by his lawful agent; and an indictment will not be struck from the files, on motion, because the name of the owner is not indorsed on it as prosecutor, although it would be quashed, on motion and proof, if it was preferred without the necessary complaint.

2. *Justification under verbal license; charge as to.*—When the defendant, in a prosecution under this statute, justifies the killing under a verbal license or authority from the owner, and the language relied on as conferring such license is doubtful and ambiguous, it should be left to the jury to determine its meaning; and a charge asked, assuming that the language used conferred such authority, is properly refused.

3. *Value of animal killed, or damage to owner.*—The value of the animal killed or injured, or the amount of the damage to the owner, though material in fixing the amount of the fine, has no bearing on the question of guilt *vel non*; consequently, a charge which instructs the jury that, “if the owner has sustained no damage, they must acquit the defendant,” is properly refused.

4. *Tender of compensation.*—When the defendant sets up a tender of compensation before the commencement of the prosecution, as authorized by the statute (§ 4411), he must show an actual tender, or an excuse for not making a tender, which is good and sufficient under the general law of tender, and must bring the money into court. That the owner claimed more than the defendant thought was full compensation, or refused to say what he would accept, is no excuse for not making a tender. It is the defendant's duty to tender a sufficient sum, and, if not accepted, he must determine the amount at his own risk.

FROM the Circuit Court of Perry.

Tried before the Hon. GEO. H. CRAIG.

The indictment in this case charged, in the first count, that

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the defendant, William Ashworth, "unlawfully or wantonly killed an ox, of the value of twenty-five dollars, the personal property of James Cook;" and in the second, that he "did unlawfully or wantonly kill, disable, disfigure, destroy, or injure an ox," &c., the property of said Cook. The defendant moved the court to strike the indictment from the files, "because, when said indictment was filed in court, 'No prosecutor' was marked on it." It was admitted, on the hearing of this motion, "that no prosecutor was marked on said indictment when it was filed in court; and that the grand jury had instructed the solicitor to mark the name of James Cook on it as prosecutor, and had refused to find the indictment until said Cook had consented to be marked as prosecutor." The court overruled the motion, and the defendant excepted; and he then pleaded not guilty, on which plea issue was joined.

On the trial, James Cook was introduced as a witness for the State, "and testified in substance as follows: Defendant did shoot and kill an ox, the property of witness, within twelve months before the finding of the indictment, and in said county. The ox was at the time in the field of defendant's father, and had destroyed a large portion of defendant's oat crop, said oats growing in a field surrounded by a fence four or four and a half feet high. Defendant drove the ox three times from the oat field back to witness, with the request that he be kept out of the field; and on the third time the following conversation occurred: Defendant said: 'Mr. Cook, here is your ox again; what do you intend to do with him?' Witness replied: 'I don't intend to do any thing with him.' Defendant then said: 'If you don't do something with him, I will; I do not expect to let him eat any more of my oats.' Witness replied: 'You had better kill him, if you are able to pay for him.' Defendant then said: 'I do not wish to hurt the ox, but I am able to pay for him, and I will kill him if he gets back in my oats.' Witness then said: 'Be certain that you can pay for him, and then kill him and be d—d. I am an easy mule to lead, but a d—d hard one to drive.' Defendant said: 'I can pay for the ox; and if he gets in my oats again, I will kill him, and then pay for him.' The ox again entered the field, and the defendant shot and killed him while trespassing on the oats. Defendant went immediately to the house of witness, and told him that he had killed the ox. Witness took possession of the ox, sold a part as beef, and ate a part with his family; and he had the hide. It was proved, also, by said Cook, that the ox was an inferior work ox; and by other witnesses, that it was a bad jumping animal, and had jumped a twelve-rail fence with a rider. It

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was proved that defendant, by his father, told Cook that he would pay whatever the ox was worth before prosecution, and asked what he valued him at; that Cook charged thirty dollars as the value of the ox, which amount defendant refused to pay, but proposed to allow disinterested parties to value the ox, and he would pay such value; but Cook refused to agree to this proposition. Said Cook swore to the jury that the ox was of less value than he had charged defendant, when he (defendant), by his father, proposed to pay for the ox; that no further offer to pay for the ox, or tender of payment, was made. As to the value of the ox, the testimony was conflicting; but the jury trying the case assessed the value at ten dollars, and no witness placed it as high as thirty dollars. It was further proved, also, that the defendant has been willing and able at all times to pay full value for the ox, but had not offered to do so further than as above stated; and that he was an obedient and dutiful son, and an honest, industrious, and obedient boy.

"The testimony above set out being before the jury, the defendant requested the court, in writing, to charge the jury:

"1. If the jury believe, from the evidence, that James Cook has sustained no damage, they must acquit the defendant.

"2. If the jury believe, from the evidence, that James Cook was the owner of the ox killed, and that he told defendant to kill the said ox if he was able to pay for him, and that the defendant did kill him under said direction, then they must acquit the defendant.

"3. If the jury believe, from the evidence, that the defendant was barred from making payment by the refusal of James Cook to name a sum [as] the value of the ox, then the defendant is excused from tendering payment.

"4. If the defendant, through his father, or otherwise, told Cook that he was willing to pay the full value of the ox, and Cook named an amount above the value, as the lowest he was willing to receive, then this will excuse the defendant from actually taking the money in his hand and offering it to him."

The court refused each of these charges, and the defendant duly excepted to each refusal.

J. H. KING, for the defendant.—1. The indictment should have been struck from the files, on motion made for that purpose. Although the general statute, in reference to indorsing the prosecutor's name, has been held directory merely; yet this statute goes much further, and prohibits a prosecution, except upon the complaint of the owner, &c.,

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and the indictment should show on its face a compliance with the statute. Besides, the proof showed that the grand jury refused to find the bill until Cook consented to be marked as prosecutor, and that the solicitor was instructed to make the necessary indorsement. Until the indorsement was made, the finding was conditional, and had not the force of an indictment; nor could the indorsement be added after the paper had passed out of the hands of the grand jury, and had been filed in court.—See *United States v. Coolidge*, 2 Gall. 367, cited in 53 Ala. 485.

2. The prosecution, though conducted in the name of the State, is a *quasi-civil* proceeding. Its object is not so much to punish the wrongdoer, as to compensate the party damaged, giving him the aid of the criminal law to enforce his claim for indemnity, which, in a strictly civil proceeding, would often be defeated by insolvency and exemptions. If the party complaining has sustained no damage, the prosecution ought to fail.

3. If the defendant was authorized by the owner to kill the ox *damage feasant*, that was a complete defense. *Volenti non fit injuria*. The conversation between the parties, as detailed by Cook himself, showed a verbal license to kill the ox, on making compensation for his value; if it did not even amount to a contract—a proposition made and accepted.

4. In allowing proof of compensation made or tendered, as a defense, it could not have been intended to allow the prosecutor to fix the measure of his own compensation; for that would, in most, if not all cases, defeat the statute. The proof was clear, that the defendant had made every reasonable offer of reparation, and was defeated by the excessive demands of the prosecutor, who should not be allowed the aid of the criminal law to speculate in such a case.

5. The whole statute is unconstitutional. All criminal prosecutions must be instituted and carried on in the name of the State, and by its authority.—Art. VI, § 28. But this prosecution, the statute says, can only be instituted on the complaint of the owner. He is the actor, and his complaint is the only authority for it: without that authority the prosecution is prohibited.

H. C. TOMPKINS, Attorney-General, for the State.—1. The evidence showed that the prosecution was instituted on the complaint of the owner, and that meets all the requirements of the statute. The failure to indorse the name of the owner as prosecutor does not affect the validity of the indictment, though it might render the foreman of the grand jury liable for the costs of the prosecution.—*The State v. Hughes*, 1 Ala. 655.

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2. The value of the animal killed or injured, or the damage to the owner, does not affect the question of the defendant's guilt. It is only material in assessing the fine.

3. The language used by the prosecutor, in the conversation with the defendant as given in evidence, instead of being a license or authority to kill the ox, was a warning, or implied threat against the act. At any rate, it was for the jury to determine the meaning of the language used, in view of all the circumstances, and the court properly refused to instruct them as requested.

4. When the statute speaks of payment, or tender of compensation, the terms must be construed with reference to the general law. The evidence entirely failed to show a legal tender, or a valid excuse for the omission to make such tender.—2 Chitty on Contracts, 1192-94; 2 Greenl. Ev. §§ 602, 603.

STONE, J.—It is contended for the accused, that the present indictment is defective, and should have been struck from the file, because the name of the owner of the ox, alleged to have been unlawfully or wantonly killed, was not indorsed on the indictment as prosecutor. The indictment is framed under section 4410, Code of 1876, which directs that “no bill of indictment shall be found, or prosecution maintained, except upon the complaint of the owner of the stock, or his lawful agent.” The statute in question does not require, in terms, that the record shall show the complaint was made by the owner, or his lawful agent. Grand jurors are a part of the court, act in the interest of the public, and under a solemn oath; and we hold it to be our duty to indulge the same presumptions in favor of their correct action, we would indulge in favor of other acts, official and quasi-official. *Rite esse acta*, is the presumption in such cases.—*Brandon v. Snows*, 2 Stew. 255; 1 Greenl. Ev. § 20a; 2 Best Pre. Ev. § 353. The Circuit Court did not err in refusing to strike the indictment from the file.—*Perry Co. v. S. M. & M. R. R.*, 58 Ala. 546. Should the grand jury disregard this solemn duty, and prefer an indictment when neither the owner of the stock nor his lawful agent made complaint, the court, on motion and proof, would quash the indictment. *Sparrenberger v. The State*, 53 Ala. 481.

2. The conversation between Cook, the owner of the ox, and the accused, when the latter drove the ox to the residence of the former, can not be construed as a license or authority to kill the ox. The language implies altercation, and some anger. It rather contains a warning, that, if Ashworth killed the ox, he would be required to pay for it, than

[Ashworth v. The State.]

a permission to kill him. If it be thought the remark of Cook gave to defendant authority to shoot and kill the ox, the language is of so ambiguous a character that it should have been left to the jury to say whether or not it conferred the authority. The second of the charges asked was rightly refused, because it claimed an acquittal on the assumed ground that certain words spoken by Cook justified Ashworth's act, when, as we have seen, they were of too doubtful meaning to justify such positive instruction.

3. The charge first asked was also rightly refused. The value of the animal unlawfully or wantonly killed, or the amount of damage done the owner, is not an inquiry on the question of guilt *vel non*. On the question of fixing a minimum fine, it is material.—Code, § 4409.

4. To excuse a defendant, and justify his acquittal, on the ground that full compensation has been paid, or tendered before the commencement of the prosecution (Code of 1876, § 4411), there must be actual payment, or actual tender made, or excuse given for not tendering, which is good and sufficient under the general law of tender; and the money must be brought into court, and so deposited that the owner may obtain it, if the plea of tender be made good. The simple fact that the owner of the property claimed more than the defendant believed was full compensation, is no sufficient excuse for not tendering. Nor is it made the duty of the owner, as matter of law, to make known what sum will satisfy him. Tender would rarely, if ever, become necessary, if parties were agreed on the sum actually due and owing. One who seeks to obtain the advantage which a tender gives, must determine the amount for himself; and he loses all benefit of the tender, even when actually made, if the sum tendered be ascertained to be too little.—Code, § 2987; *Rudolph v. Wagner*, 36 Ala. 698, and citations. Charges 3 and 4 were rightly refused, because neither of them comes up to the rule above declared. Charge number 4 is objectionable on another account. The bill of exceptions contains no evidence that the sum named by Cook, thirty dollars, was "the lowest he was willing to receive." On this account, the charge must be classed as abstract.

The judgment is affirmed.

[Berry v. The State.]

Berry v. The State.*Indictment for Murder.*

1. *Organization of grand jury.*—The statute provides that eighteen persons, neither more nor less, shall be drawn and summoned as grand jurors (Code, § 4738); and further (§ 4753), that the grand jury, when organized, shall consist of not less than fifteen; and when, of the persons regularly drawn and summoned, fifteen appear, and are ready and capable to discharge the duties of grand jurors, the grand jury should be organized with them only (§ 4754), and the court has no power to add to the number.

2. *Same; objection to indictment, on account of defects in.*—An indictment, returned by a body organized by the court without authority of law as a grand jury, will not support a judgment of conviction.

ERROR to the Circuit Court of Elmore.

Tried before the Hon. J. Q. SMITH.

WATTS & SONS, for the plaintiff in error.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—The qualifications of grand and petit jurors, the mode of selecting and summoning them, and the number which may be selected, and a precept issued to summon, are the subject of very careful and ample statutory provisions. Not more nor less than eighteen persons can be drawn and selected, and no precept can be properly issued for the summoning of any other number, to serve as grand jurors. When organized, the grand jury cannot be composed of more than eighteen, nor less than fifteen persons, of the requisite qualifications. In the first instance, the drawing and selection of jurors is committed to the judge of probate, the sheriff, and the clerk of the Circuit Court of the county; unless the jury is drawn for a City Court, when the clerk of that court takes the place of the clerk of the Circuit Court. Their power and authority is exclusive; and the sheriff is charged with the duty of summoning those who are drawn and selected. When the court assembles, if fifteen of the persons so drawn and selected, duly qualified, do not appear; or if, by reason of excuses or discharges allowed by the court, or from any other cause, the number is reduced below fifteen, the deficiency may be supplied under orders of the court, the mode of supplying being particularly prescribed. Code of 1876, § 4754. It is only when there are not fifteen

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of those drawn and summoned, in attendance, ready and capable of discharging the duties, that a deficiency could exist. Therefore, it is in that event only the statute has conferred on the court the power to interfere, and compel the attendance and introduction into the constitution of the jury of persons who have not been drawn and selected by the officers charged in the first instance with that duty.

This record discloses that eighteen persons were properly drawn and selected to serve as grand jurors, and a regular precept issued commanding the sheriff to summon them, which was fully executed. All of them, except one appeared, and two were excused and discharged by the court, leaving fifteen in attendance, who were impanelled and sworn. Yet, the court caused three other persons to be drawn from six summoned under its order, who were also sworn of the panel, and served, thus increasing the jury to eighteen. The body thus organized found and presented the indictment upon which the defendant was put on trial and convicted. The court exercised authority the statute withholds, and the grand jury were not organized and constituted as the law requires. The indictment is, consequently, vicious, and the judgment of conviction cannot be supported. The statute is clear and unambiguous in its terms; there can be no necessity for departing from them; and there is no discretion in any court to observe them, or to substitute for them other provisions and other modes of organizing a grand jury.

Let the judgment be reversed, and the cause remanded. The defendant will remain in custody, until discharged by due course of law.

Preston v. The State.

Indictment for Carrying Concealed Weapons.

1. *Drawing grand jurors: defect in, how available.*—It is not necessary for the record, in a criminal case, to show affirmatively that the grand jurors were drawn in the presence of the officers to whom that duty is by law committed: if they were not so drawn, that is matter for a plea in abatement.

2. *Carrying concealed weapons: what will not excuse*—It is no excuse for carrying a pistol concealed about the person (Code, § 4109), that the defendant was engaged to play a part in which a pistol was to be used, in a school exhibition to take place on another day.

FROM the Circuit Court of Lee.

Tried before the Hon. JAMES E. COBB.

[Preston v. The State.]

The indictment in this case charged, that the defendant "carried a pistol concealed about his person." There was no demurrer to the indictment, nor any plea in abatement; and the trial was had on issue joined on the plea of not guilty. "On the trial," as the bill of exceptions states, "there was evidence that the defendant was one of the participators in a school exhibition; that the part assigned to him, in one of the plays, was a dialogue with another person, wherein it was required that he should have a pistol; that the practicing for the exhibition, in plays in which defendant had no part, was taking place at the school-house at night, but the play in which he was to act was not to be played that night; and that the defendant had his pistol concealed outside the house, and drew it in a personal difficulty not connected with the performance. The defendant asked the court to give the following charge to the jury, which was in writing: 'If the jury find that the defendant only carried a pistol in his pocket as a participator in an exhibition, or practicing at an exhibition, wherein his part required him to have such pistol in his pocket, then they must find him not guilty.' The court refused to give this charge, and the defendant excepted to its refusal." This is the only matter shown by the bill of exceptions. The jury having returned a verdict of guilty, assessing a fine of fifty dollars, the court thereupon rendered judgment against the defendant, "for the amount of the fine so assessed, and also the costs and fees in this case."

There is an assignment of errors on the transcript, but without signature, as follows: "1. The grand jury that found the indictment was illegal, as there is nothing to show that the proper officers participated in drawing the same: it was only the act of the clerk. 2. There is no order of the court completing the grand jury, but merely an assertion of the clerk to that effect. 3. The judgment of the court is wrong, being entered for the fine, costs, and fees. 4. The refusal to charge as requested was error."

H. C. LINDSEY, for the defendant.

H. C. TOMPKINS, Attorney-General, for the State.

MANNING, J.—Appellant was indicted for carrying a pistol concealed about his person.

The objection of illegality, because it is not declared in the record that the names of the persons who were summoned to serve as grand jurors were drawn by the officers to whom the law committed that duty, cannot be sustained. The process of this drawing is never entered on the minutes

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of the court. That act is performed some time before the term of the court begins. When the court is opened, the persons summoned by the sheriff, and named in the *venire* previously issued, which he brings with his return thereof into court, are called; and a grand jury is then constituted. With the recital of the opening of the court, and of these proceedings therein, the record of the cause properly commences. And if a person who is indicted for any offense, wishes to object that the grand jurors, by whom the accusation is made, were not drawn in presence of the officers designated by law, he must do so by plea in abatement. Code of 1876, §§ 4889, 4890.

2. The fact that defendant was engaged to play a part in which a pistol was to be used, in a school exhibition on the next or a different day from that on which he carried a pistol concealed, and drew it in a personal difficulty with another, afforded no excuse for the offense with which he was charged. The circuit judge did not err in refusing to give the instruction asked.

Let the judgment be affirmed.

Shorter v. The State.

Indictment for Carrying Concealed Weapons.

1. *Declarations not to be garbled.*—To make out a threatened or apprehended attack, as a defense to a prosecution for carrying concealed weapons (Code, § 4109), the defendant offered in evidence a letter written by the prosecutor to the chief of police, in which the writer stated "that he did not wish to violate the law, nor to be arrested for violating the law, but that he understood the defendant had made threats against him, and was therefore carrying a pistol concealed about his person." *Held*, that the contents of the letter could not be garbled by the defendant, but must be taken altogether as written; and that the court properly refused a charge, requested by him, to the effect "that what was said in the letter about any threats made by him could not be considered by the jury as evidence."

2. *Threatened or apprehended attack; relevancy of evidence as to.*—To make out the defense of a threatened or apprehended attack, within the statutory exception, the motive (or purpose) of carrying the weapon must be defense against violence, threatened or apprehended. If offense instead of defense—a meditated attack on another, and not an apprehended attack by him—be the real motive, the party is guilty of violating the statute; and as bearing on this question, the conduct and declarations of the accused and the prosecutor, during an altercation and subsequent rencontre between them, out of which the prosecution arose, are relevant and competent evidence.

3. *General objection to evidence.*—A general objection and motion to exclude a mass of evidence, some of which is legal and admissible, may be overruled entirely.

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4. *Threatened or apprehended attack.*—To establish the defense of a threatened attack, the threat must be real, and not simply apparent, or simulated; but, to make out an apprehended attack, it is sufficient to show facts which may convince the jury that he had good reason to apprehend an attack—as reports of threats, believed to be true, though not true in fact; hostile demonstrations; preparations for attack, real or apparent, and the entire conduct of the parties.

5. *Charge as to amount of fine to be assessed by jury.*—In a prosecution for carrying concealed weapons, the court may properly instruct the jury, that, if they find the defendant guilty, they should assess such fine, within the limits fixed by law, as they may deem necessary to suppress the evil practice of carrying concealed weapons.

FROM the City Court of Montgomery.
Tried before the Hon. JOHN A. MINNIS.

J. GINDRAT WINTER, for defendant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The defendant was indicted under section 4109, Code of 1876, for carrying concealed about his person a pistol. The defense was, that he was threatened with, or had good reason to apprehend an attack. If the jury believed the testimony of the three witnesses examined for the State, a *prima facie* case against the accused was shown. Defendant then proved that, in a letter written by one Sharp, to the chief of police, as we infer, and only a few days before the occurrence out of which this indictment grew, Sharp stated, that “he did not wish to violate the law, or to be arrested for violating the law, but that he understood that defendant had made threats against him (Sharp), and that he was consequently carrying concealed about his person a pistol.” The witness, chief of police, testified that, immediately after he received said letter, he showed it to the accused, who read it, and remarked, “that he would pull Sharp’s beard, or that he ought to pull his beard.” Another witness, to whom the letter was shown (the letter had been destroyed, and was not produced), described its contents substantially as the first witness had done, and added, that he had heard defendant was carrying a pistol for Sharp. The difficulty, hereafter referred to, between the defendant and Sharp, appears to have had some connection with a State prosecution before a justice of the peace, of a person called “Happy John,” prosecuted by Sharp, and defended by the defendant in this cause, as counsel. On a previous day, when said cause was called for trial, Sharp moved for a continuance, when defendant remarked, Sharp “would swear to anything.” Sharp made no reply. It was also shown that, on the day preceding the rencontre, after mentioned, Sharp and the defendant

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were, at the same time, in the law-office of another attorney, and "that they were apparently friendly."

The bill of exceptions recites that it contains all the evidence; and the foregoing is all the testimony bearing on the question of excuse for carrying the pistol concealed about the person. There is not a word in it, or inference to be drawn from it, tending, in the remotest degree, to show that the defendant had been threatened with, or had any reason to apprehend an attack. On the contrary, the letter of Sharp, the contents of which were known to the defendant, repelled all idea that he, Sharp, meditated an attack. That letter contained the only evidence offered that Sharp was carrying a pistol, and also stated the reason he gave for carrying it. The contents of the letter were put in evidence by the defendant, for the purpose, we must suppose, of making good his excuse for carrying a pistol. Putting Sharp's admission in evidence, he was bound to take it as it was made, and could not be allowed to reject a part of the statement, which he thought would operate against him. If any part went to the jury, all he said on the same subject, in the same conversation or letter, must be laid before them, to be weighed by them. The jury were not bound to believe all, but it could not be garbled in laying it before them. They "must be taken altogether—that which makes for the party, as well as that which makes against him. The jury are not bound to give equal credence to every part."—1 Brick. Dig. 835, § 437. If the defendant desired to have the jury instructed in the rules for weighing such admissions, this was a subject for a charge, not a ground for excluding any part of the evidence. Taken altogether, the letter, if considered as evidence of Sharp's feelings and purposes, tended to show he was carrying the pistol for defense against an attack he apprehended from the defendant, and with no view of himself becoming an aggressor. The City Court did not err in refusing to instruct the jury, "that what Sharp had said in the letter, about any threats made by defendant, could not be considered by them as evidence."

Although, as we have said, we fail to find in the record any evidence that defendant had been threatened with, or had good reason to apprehend an attack, still some testimony had been laid before the jury, which was obviously relied on as tending to show such excuse for carrying the pistol; and, as it can not be known what influence slight circumstances in evidence may exert on juries, the court did not err in receiving rebutting evidence. The conduct of the parties, on each of the occasions when they were before the justice of the peace, and especially the circumstances immediately

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preceding and attending the rencontre on the last of those occasions, were certainly admissible evidence on the inquiry, whether the defendant apprehended an attack from Sharp, or meditated an attack upon Sharp. If the latter, then it furnished no excuse to him for carrying the pistol. So, that the parties were together, and "apparently friendly," on the day preceding the difficulty, and subsequent to the date of Sharp's letter to the chief of police, was a circumstance tending to repel the idea that Sharp contemplated an attack on defendant.—See *Baker v. The State*, 49 Ala. 350; *Eslava v. The State*, *Ib.* 355. We reaffirm the doctrine declared in *Stroud's case*, 55 Ala. 77, that "the motive; the purpose of carrying the weapon, must have been defense against violence, which has been threatened, or which is reasonably apprehended. If this is not the motive—if offense, not defense, is the real purpose, though facts may exist which would [otherwise?] justify the carrying the weapon concealed, the statute is violated."

If the witnesses in rebuttal are thought to have gone too far in giving the particulars of the altercation and combat, then the objection should have been confined to that part of the evidence, which it is alleged was in excess of what the rule allows. Manifestly the court below did not err in receiving evidence of the words and conduct of each party immediately preceding the assault, of the person by whom the first assault was made, and in what manner provoked and resented. All this tended to determine the question, whether the defendant apprehended an attack on him, or meditated an assault on Sharp. The objection and motion to exclude were directed against all testimony of this combat, and did not separate the legal from the illegal, if any part was illegal. The court was not bound to separate the legal from the illegal portions of the evidence, but need only respond to the motion as made. The court did not err in overruling this objection.

That the pistol was carried by the defendant concealed about his person, appears to be one of the uncontroverted facts in this case. The defense, or exculpation, assumes two phases: *first*, that the accused was threatened with an attack; and, *second*, that he had good reason to apprehend an attack. Either of these, if proved to the satisfaction of the jury, is sufficient, without invoking the other. The first is a fact, and, like any other fact, is susceptible of direct, positive proof. The threat, to amount to a defense, must be real, not simulated, or simply apparent. In the absence of an actual, real threat, it can not be affirmed that the accused has been threatened with an attack. The other phase of the defense

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rests on different principles. Report of threats, believed to be true, though in fact untrue; hostile demonstrations; preparation for attack, real or apparent, and the entire conduct of the parties, may be considered by the jury, in a conscientious inquiry, whether the defendant had just grounds to apprehend an attack. If, in this honest search after truth, the jury are convinced the defendant had good reason to apprehend an attack, and that he carried the pistol for defense against such apprehended attack, and not for use in an encounter he himself intended to bring on, or provoke, then the defense is made good, and should be allowed.—*Baker v. The State*, 49 Ala. 350.

We have had occasion heretofore to remark, that carrying concealed weapons is one of the most pernicious practices that modern civilization has developed.—See *McManus v. The State*, 36 Ala. 285; *Mitchell v. The State*, 60 Ala. 26. It is the *causa causans* of perhaps three-fourths of the homicides which stain our criminal jurisprudence. Could legislatures and courts discover some method by which this causeless, evil practice can be reformed, the result would be a vast saving of valuable lives to the commonwealth. A more vigorous prosecution, and severer punishment of violators of this wholesome statute, would mark an era of reform, and of a more peaceful state of society. If offenders in high social position were made an example of—were made to know and to suffer the sterner penalties the law has provided—this dangerous practice would become much less prevalent, and homicides much less frequent. Punishment is not inflicted, as an atonement exacted for the wrong done. It has a twofold object: reformation of the offender, or the disabling of the perpetrator, temporarily or permanently, to commit like offenses. This is the law's operation upon the offender himself. But the penalties and sanctions of the law have a wider aim. They look to the welfare of the general public, and seek to deter others, by the dread of the example made of one offender, from offending in the like way.—4 Black. Com. 11. Public terror and public restraint are among the higher aims of human punishment; and it is not error to instruct the jury, in such a case as this, if they find the defendant guilty, then they should assess such fine, within the limits prescribed by law, as, in their sound judgment and discretion, is necessary to suppress the evil.—*Weed v. The State*, 55 Ala. 13.

We find no error in the record, and the judgment of the City Court is affirmed,

[Graves v. The State.]

Graves v. The State.

Indictment for Burglary.

1. *Breaking into railroad car ; sufficiency of indictment.*—In an indictment for burglary in breaking and entering a railroad car (Code, § 4344), it is not sufficient to aver that the goods in the car were therein kept “for transportation”: the averment should be, that they were kept “for transportation as freight.”

2. *Same ; averment of ownership.*—In an indictment under this statute, the ownership of the car broken into and entered is an indispensable averment. (STONE, J., *dissenting.*)

ERROR to the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The indictment in this case charged that the defendant, Levi Graves, with others, “broke into and entered a railroad car, upon or connected with the Western Railroad of Alabama, in which car goods, merchandise, or meat, of the value of fifty dollars, was kept for use, deposit, or transportation, with intent to steal ; against the peace,” &c. There was a motion in arrest of judgment, on account of the insufficiency of the indictment, in failing to aver the ownership of the car or its contents ; which motion was overruled. The case is brought to this court by writ of error.

J. GINDRAT WINTER, for the defendant, cited Clark’s Manual, §§ 869, 881 ; *Horton v. The State*, 53 Ala. 493 ; *Johnson v. The State*, 32 Ala. 583 ; *Danner v. The State*, 54 Ala. 127.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—The indictment is founded on the statute (Code of 1876, § 4344) which declares the breaking and entry, with intent to steal, or commit a felony, into any railroad car, upon or connected with any railroad in this State, in which any goods, merchandise, or other valuable thing, is kept for use, deposit, or transportation as freight, is burglary, punishable on conviction by imprisonment in the penitentiary, not less than two, nor more than four years. An indictment, founded on a statute creating a new offense unknown to the common law, is insufficient, unless it clearly alleges every fact which enters into and is an ingredient of the offense. This statute is intended to protect goods kept

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in a railroad car, if they are so kept for use, or on deposit, or for transportation as freight. If not kept for one of these purposes, they are not within the protection of the statute, and the breaking and entry of the car, though with an intent to steal, or to commit a felony, is not within the words of the statute. One of the alternative averments of the indictment is, that the goods were kept in the car for transportation, omitting to aver the transportation was as *freight*. If not kept for transportation *as freight*, the goods were not within the protection of the statute. One of the alternative averments fails, consequently, to disclose the statutory offense.—*Horton v. The State*, 53 Ala. 488.

Another defect in the indictment is, that the ownership of the car is not averred. In all indictments for burglary, it is as essential to aver the ownership of the house, or other place broken and entered, as it is in larceny to aver the ownership of the goods stolen.

The judgment must be reversed, and the cause remanded. The prisoner will remain in custody, until discharged by due course of law.

STONE, J., dissenting on the second point considered.

Washington v. The State.

Indictment for Assault with Intent to Murder.

1. *Jury not judges of the law in criminal cases.*—The jury are not, in a criminal case, the judges of the law as well as of the facts: it is their duty to receive the law from the court, and to be governed by its instructions; though they have the power, in violation of their sworn duty, to return a verdict of acquittal against the instructions of the court as to the law of the case.

2. *Intent, as ingredient of offense; charge as to.*—The intent, or state of mind, with which the defendant made the assault upon the prosecutor, or person injured, is a question for the determination of the jury, in view of all the evidence; and a charge to the jury which predicates it of a given state of facts, as matter of law, is properly refused.

FROM the Circuit Court of Hale.

Tried before the Hon. GEO. H. CRAIG.

The indictment in this case charged, that the defendant, "unlawfully, and with malice aforethought, did assault Van Hambright, with the intent to murder him." The defendant pleaded not guilty, and was tried on issue joined on that plea. "On the trial," as the bill of exceptions states, "the

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evidence showed that, in said county of Hale, and within one year before the finding of the indictment, the defendant had separated from his wife, on account of her criminal intimacy with Van Hambright, the person alleged to have been injured by defendant; and it tended to show that, a short time afterwards, he saw his wife sitting in Van Hambright's lap. The evidence showed that defendant thereupon pulled out a pistol, and shot Van Hambright in the thigh, while he was sitting in the chair, inflicting a severe but not dangerous wound; and that defendant immediately turned and left. The defendant then asked the court to give the following charges, which were in writing: 1. 'The jury are the judges of the law and facts in a criminal prosecution.' 2. 'The jury are the judges both of the law and the facts in a criminal case, and are not bound by the opinion of the court. The jury may judge for themselves, and if they feel it their duty to differ from the court on a question of law, they may find their verdict accordingly.' 3. 'If the jury believe, from the evidence, that the defendant thought his wife and Hambright were in the act of adultery, then they must acquit him of an assault with intent to commit murder.' The court refused each of these charges, and the defendant excepted to their refusal separately."

THOS. R. ROULHAC, and THOS. SEAY, for the defendant.

H. C. TOMPKINS, Attorney-General, for the State, cited *Batre v. The State*, 18 Ala. 119; *Pierson v. The State*, 12 Ala. 149; *Thompson v. The State*, 21 Ala. 48; *Brown v. The State*, 31 Ala. 353.

MANNING, J.—The question of law raised by the exception to the refusal of the circuit judge to give to the jury the first two charges asked for the defendant, has been long since settled by the decisions of this court. Said DARGAN, C. J., in *Batre v. The State*, 18 Ala. 123, "The jury are not the constituted judges of the law in any case, unless they be made so by statute. The whole theory of our jurisprudence disproves it. They cannot judge of the competency of evidence, and order its admission, in opposition to the opinion of the court. The defendant has, too, an unquestionable right to ask the court to instruct the jury on any point in the cause, that may be favorable to him; and it is the bounden duty of the court to give the instructions, if they be in accordance with the law. And should the court refuse," or its instructions to the jury be erroneous, to the injury of defendant, the Supreme Court, upon the cause being prop-

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erly brought before it, would be bound to reverse the judgment for the error committed by the presiding judge. The Supreme Court must "either reverse or affirm the decision of the court below, as they may find it to be in accordance with, or opposed to the law. This view, to our mind, is conclusive, that the judge is the only person legally authorized to determine the law." . . . "We know," continues the Chief-Justice, "it has been said by courts of respectable authority, that the jurors, in a criminal case, are the judges of the law, as well as the facts; but we think this opinion arises from not distinguishing between the powers that a jury may assume to exercise, and the duties confided to them by law. The law does not constitute them the judges, yet they may assume the responsibility of rendering a verdict contrary to law, as given to them in charge by the court; and if they do so in a criminal case, and acquit the prisoner, their verdict is conclusive, for it is not under the control of the court. This power, however, that they may exercise upon their own responsibility, does not constitute them judges of the law in a legal sense; but, on the contrary, in a legal point of view, they violate the law in rendering a verdict contrary to the rules laid down to them by the court."

What we have quoted from the opinion of Chief-Justice DARGAN is so well expressed, that we have thought we could not do better than reproduce it on the present occasion. The circuit judge did not err in refusing to give either of the first two instructions asked on behalf of respondent.

2. Nor was there any error in refusing the third of the charges so asked. It was for the jury, not the judge, to determine, in view of all the evidence introduced, *quo animo*, in what state of mind, the assault of defendant upon Van Ham-bright was made. Indeed, as husband and wife were already separated, and living apart, it may be that defendant, instead of being suddenly excited to madness by the sight of his wife in such a situation, and acting under an uncontrollable and not unnatural impulse, rather rejoiced in the opportunity that situation afforded him, of killing Van Ham-bright to gratify a cherished resentment, with a fair prospect of impunity. If the jury believed this, they should have found defendant guilty as charged.

Let the judgment of the Circuit Court be affirmed.

[Mack v. The State.]

Mack v. The State.*Indictment for Obtaining Property under False Pretenses.*

1. *Intent to injure or defraud; averment and proof of.*—Under an indictment for obtaining money or chattels by false pretenses (Code, § 4370), an intent to injure or defraud must be alleged and proved; but it is not necessary to aver the name of the person intended to be injured or defrauded, and it is sufficient to prove an intent to injure or defraud the owner, or any person having the possession and custody of the money or chattels.

2. *Same; widow's interest in goods of deceased husband's estate, before administration granted.*—The widow has such an interest in the personal chattels belonging to the estate of her deceased husband, before letters of administration have been granted on the estate, that a conviction may be had under the statute against any one who, by any false pretense, obtains possession of them from a bailee, with intent to injure or defraud her.

3. *Relevancy of evidence showing use by defendant of goods or chattels; presumption in favor of ruling of court.*—The use to which the chattels or goods are applied by the defendant, after obtaining them by the alleged false pretense, showing a conversion, or attempted conversion to his own use, is competent evidence against him, as tending to prove an intent to injure or defraud the owner; and if the bill of exceptions leaves it doubtful whether this was before or after he had obtained them by the false pretense charged, this court will indulge the presumption which will support the ruling of the primary court.

FROM the Circuit Court of Dallas.

Tried before the Hon. GEO. H. CRAIG.

The indictment in this charged, that the defendant, John Mack, "falsely pretended to Ebenezer Smith, with the intent to defraud, that he, the said John Mack, had been sent by Ella Mack to him, the said Ebenezer Smith, to get a violin, tenor horn, and a B-flat horn, for the said Ella Mack; and, by means of such false pretense, obtained from the said Ebenezer Smith one violin, one tenor horn, and one B-flat horn, of the value of ten dollars; against the peace," &c. "On the trial," as the bill of exceptions states, "the State introduced Ella Mack as a witness, who testified, that she was the widow of Jim Mack, brother of the defendant, who lately died, owning a set of musical instruments, among which were the instruments named in the indictment, which were in the custody of Smith; that she never told the defendant to go to Smith and get them, and never authorized him to get them for her from Smith. She further testified, that she had never obtained or applied for letters of administration on the estate of her said deceased husband, who was the owner of said instruments in his life-time. The State then intro-

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duced one Smith as a witness, who testified, that he knew Jim Mack in his life-time, and that he was the owner of a set of musical instruments, among which were those mentioned in the indictment; that Jim Mack asked him (witness), during his last illness, to get up his instruments, and to keep them for his wife, and directed him to give them to her; that in getting them up he found one of them at the store of A. J. Skinner in Selma; that the defendant came to him, and told him that Ella Mack, his sister-in-law, had sent him to witness for the instruments; that he thereupon delivered the instruments to said defendant, among them being the instruments named in the indictment; that he would not have given them to him, but for the belief that Ella Mack had sent him for them; and that this occurred in said county of Dallas, and within twelve months before the finding of the indictment. The State then introduced A. J. Skinner as a witness, who testified, that the instrument found by Smith at his store had been left there in pawn by the defendant for some goods bought by him, and that defendant paid for them and got the instrument. To all of which testimony, and to each part, the defendant excepted, and asked the court to exclude it from the jury; which objections the court overruled, and the defendant excepted.

"This being all the evidence introduced, necessary to a fair understanding of the points raised by the defendant, the court then charged the jury; which charge was not objected to by the defendant. The defendant then asked the court to give the following charge, which was in writing: 'Before the jury can convict the defendant under the indictment, they must believe that he not only got the instruments without the consent of Ella Mack, but with the intent to defraud her; and that before he could defraud her, she must be shown to be the legal owner of them, and this she could not be without having been first appointed administratrix of the estate of the deceased owner.' The court then refused to give this charge, and the defendant excepted to its refusal."

SUMTER LEA, for the defendant.

H. C. TOMPKINS, Attorney General, for the State.

STONE, J.—The present indictment was found under section 4370 of the Code of 1876, which declares, that "any person who, by any false pretense or token, and with the intent to injure or defraud, obtains from another any money, or other personal property, must, on conviction, be punished as if he had stolen it." The form of indictment in such case is

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found on page 996 of the Code, form 48. The pretense charged in the present case is, that the accused falsely pretended to Ebenezer Smith that he had been sent by Ella Mack for certain personal chattels, then in the possession of the former, but held by him for the said Ella. Under this pretense, he obtained possession of the chattels. To constitute this statutory crime, there must be a pretense, by declaration or otherwise, that some fact or facts exist, tending to induce another to part with something valuable, and upon the strength of which pretense or representation the possession of the valuable thing is parted with. The accomplished fraud must have reasonable connection with the pretense (Bish. Stat. Crimes, § 452); and the pretense must be shown to be false, and made with intent to injure or defraud. Defraud whom? The statute does not in terms inform us. Usually, the intent is to defraud the owner of the thing obtained; but it is sufficient if the intent be to defraud any one, connected with the ownership, possession, or custody of the chattel. Possession gives a special property, which the law regards, and will protect against any claimant, except the rightful owner. So, in this case, if Smith held the chattels for Ella Mack, or for the estate of her husband, and if he surrendered the possession to one not authorized to receive it, this would render him liable to account for its value, as for a conversion.—*Nelson v. Beck*, 54 Ala. 329. The testimony in this case tends to show that Smith's possession was that of Ella Mack, and that he held simply for her, and not in his own right. Under our statutes, the widow has a valuable and clearly defined interest in her husband's estate, and in its preservation. The alleged false pretense charged proceeds on the theory, that the instruments belonged to Ella Mack, or were subject to her control; for the testimony tends to show that the accused, when he obtained them from Smith, stated that Ella Mack had sent him for them. The intent to injure or defraud either Smith or Ella Mack, may have existed in the mind of the accused; and either one, if shown to exist, would make out that feature of the case. Either one owned sufficient property or interest in the chattels, if the testimony be believed, to be the subject of such intent.—*Crum v. Williams*, 29 Ala. 446; *Williams v. Crum*, 27 Ala. 468; *Brown v. Beason*, 24 Ala. 466. But, the intent to injure or defraud must be shown, or the offense is not complete.—*O'Connor v. The State*, 30 Ala. 9. This, however, need not necessarily be shown by independent testimony. It may be inferred from the character of the representation or pretense, its known falsity, and the attendant circumstances, if sufficient to convince the jury, beyond a reasona-

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ble doubt, that there was an intent to injure or defraud. *People v. Herrick*, 13 Wend. 87; 2 Bish. Cr. Proc. § 174.

The charge asked by defendant was rightly refused. It was not indispensably necessary, as we have shown, that there should have been an administration on the estate of the deceased Mack. The intent to defraud may have existed without that. To hold otherwise, would be to leave estates of decedents, before administration granted, at the mercy of the vicious.

On the other question, the bill of exceptions is obscure; namely, whether the transaction deposed to by Skinner occurred before or after the musical instruments were obtained by the accused from Smith. We have carefully considered its recitals, and cannot answer this question to our satisfaction. If it occurred before, then it was irrelevant to the issue presented by the indictment, and should not have been received. It was calculated to prejudice the jury, by the consideration of an act of impropriety, having no connection whatever with the offense charged. On the other hand, if it occurred after he had obtained the instruments from Smith, then the testimony was legal. It tended to show an assertion of ownership by the accused, and to repel all idea that he obtained them for the use and benefit of Ella Mack. In other words, its tendency was to show an intent to injure or defraud the rightful owner, by converting the chattels to his own use. Under a well-defined rule, we are bound to indulge every reasonable intendment in favor of the correct ruling of the Circuit Court. We cannot presume error. It must be affirmatively shown.—1 Brick. Dig. 781.

The judgment is affirmed.

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Indictment for using Obscene Language in Presence of Female.

1. *Organization of grand jury; supplying deficiency of original venire.*—When twelve of the persons originally summoned as grand jurors appear and are accepted by the court, there is no error in requiring the sheriff to summon twelve other persons for the completion of the jury (Code, § 4754), although a grand jury may be composed of only fifteen persons; nor is it error to direct the summons of "good and lawful citizens from the body of the people of the county, who possess the qualifications specified in the statutes of Alabama in such case made and provided," instead of using the exact words of the statute, "qualified citizens of the county."

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2. *Using insulting language, &c., in presence of females; sufficiency of indictment, and constituents of offense.*—In an indictment for using insulting, abusive, or vulgar language in the presence of females (Code, § 4203), it is not necessary to set out the words used by the accused; nor is it necessary to prove, on the trial, that the words were heard by the females present.

FROM the Circuit Court of Dallas.

Tried before the Hon. GEO. H. CRAIG.

The record in this case sets out the original *venire* of persons summoned as grand jurors, eighteen in number, of whom sixteen appeared; and the minute-entry recites that four of those appearing were excused by the court, "leaving the panel of grand jurors numbering only twelve persons; and thereupon the court ordered the sheriff of Dallas county to summon twelve good and lawful citizens from the body of the people of said county, who possess the qualifications specified in the statutes of Alabama in such case made and provided." It further shows that, of the twelve persons thus summoned, six were regularly drawn, who were added to the twelve original jurors, and the grand jury was organized with these eighteen persons.

The indictment contained two counts: the first count charging that the defendant, "Emily Yancy, *alias* Emily Pitts, entered upon the curtilage of the dwelling-house of Laura Stollenwerck, and in the presence of Hasty Stollenwerck, a female, made use of abusive, insulting, or vulgar language"; and the second, that the words were spoken in the presence of Emily Shevers. There was a demurrer to the indictment, on what grounds does not appear by the record; and the demurrer being overruled, the defendant pleaded not guilty. On the trial, as the bill of exceptions states, Laura Stollenwerck was introduced as a witness by the State, and testified that, in November, 1879, the defendant came into her yard, and, in the presence of Hasty Stollenwerck, her daughter, called her "a whore," and "a bitch." Miss Shevers, another witness for the State, testified that she was at the house of Laura Stollenwerck on the occasion mentioned, and heard the defendant use the words as stated by the first witness, and that Hasty Stollenwerck was present at the time. "This was all the testimony in the case"; and the defendant thereupon asked the court to charge the jury as follows: 1. "If the jury believe the evidence, they must find the defendant not guilty." 2. "The jury can not, in the absence of Hasty Stollenwerck, know that she heard the words alleged to have been used; and therefore the defendant must be acquitted." These charges, which were in writing, were refused by the court, and the defendant excepted to their refusal.

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SATTERFIELD & YOUNG, for the defendant.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—The grand jury were impanelled in conformity to the statute.—Code of 1876, § 4754. The number of the original *venire* not appearing, or appearing and being excused, reduced the number of jurors below fifteen; and the court properly ordered the sheriff to summon a sufficient number of persons to complete the grand jury—that is, to make it of not less than fifteen, nor more than eighteen. Ordering the summons of “*good and lawful citizens, possessing the qualifications specified in the statutes of Alabama, in such cases made and provided,*” is equivalent to an order to summon the jurors from the *qualified citizens of the county*—the persons possessing the requisite qualifications of jurors.

2. The indictment pursues the words of the statute, and is sufficient. It was not necessary to set out the abusive, insulting or vulgar language, spoken by the accused. Nor was it necessary that it should be shown that it was heard by the female averred to have been present when it was spoken. It is the fact of presence, subject to insult if the language is heard, which is of the essence of the offense.—Code of 1876, § 4203; *Ivey v. State*, 61 Ala. 58.

We find no error in the record, and the judgment is affirmed.

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Indictment for Burglary.

1. *Breaking and entering.*—A servant, employed by an attorney in and about his office, and intrusted with the key to the front door, may be convicted of burglary (Code, § 4343), if he enters the office by night, by using the key, with the intention at the time of stealing the money of his employer while asleep in an inner room; but, if he is in the habit of sleeping in the office, with the consent of his employer, or without objection from him, and enters with the intention only of going to bed, but afterwards forms the design to steal the money, and attempts to do so, he is not guilty of burglary.

2. *Same.*—In this case, since “there was no evidence that the defendant had opened the door of the office at all, as there was none that it was shut before he entered,” the court should have instructed the jury, on his request, that upon the evidence they must find him not guilty.

FROM the City Court of Montgomery.
Tried before the Hon. JOHN A. MINNIS.

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The defendant in this case was indicted for burglary, in breaking and entering "the law-office of Sayre & Graves" in the city of Montgomery, with the intent to steal. The indictment also contained a count for the larceny of a pocket-book, the property of P. T. Sayre, containing bank bills, particularly described, of the aggregate value of forty dollars; but a demurrer was sustained to this count. Under the charge of the court, to which exceptions were duly reserved, the defendant was convicted of the burglary as charged. The bill of exceptions purports to set out all the evidence adduced on the trial; but, as the material facts are stated in the opinion of the court, it is not necessary to repeat them here.

J. GINDRAT WINTER, for the defendant, cited *Allen v. The State*, 40 Ala. 334; *Chambers v. The State*, 6 Ala. 855; East's P. C. 482; Clark's Manual, § 847; *Collier v. State*, 55 Ala. 125.

H. C. TOMPKINS, Attorney-General, for the State, cited *United States v. Bowen*, 4 Cr. C. C. 604; 1 Stra. 481; Hut-ton's R. 20; 2 Russell on Crimes, §§ 7-11; 2 Wharton's Amer. Cr. Law, § 1536.

MANNING, J.—Appellant was indicted for burglary, in entering at night, through the outer front door, the office of Sayre & Graves, attorneys-at-law, from which an open door let into an adjoining bed-room, where Mr. Sayre lay, having gone to bed. The evidence tended to show that defendant went from the office, after entering it, into the bed-room, to steal money from the pocket-book of Mr. Sayre, which he had placed between the mattresses of the bed on which he was lying. And the defense is, that being a servant of Sayre & Graves, and intrusted as such by them with the key of their office, defendant was not guilty of burglary.

According to Mr. Sayre's testimony, defendant was then, and previously, in the employment of Sayre & Graves "as a servant in witness' bed-room, and as an office boy to their law-office, the same mentioned in the indictment," and had received from them, to be used "for the purpose of his employment," a key to the office front door; and that he entered through said front door, and, by use and means of said key, defendant could have ingress into said office at will; but [his] duties . . . did not call him there at night," though he "was not restricted or forbidden from using said key, and coming into said office at night; nothing being said to him as to that." Whether or not he was in the habit of sleeping there at night, is left in doubt by the evidence.

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In 2 Russell on Crimes, 7 (Sharswood's ed. of 1877), it is said: "It will also amount to a burglary, if a servant, in the night time, open the chamber door of his master or mistress, whether latched or otherwise fastened, and enter for the purpose of committing murder, or rape, or with any other felonious design." In *Edmonds's case*, in the time of James I. (Reports of Sir Richard Hutton, in black letter, p. 20), the jury returned this special verdict: "We find that Richard Heydon, and Christian, his wife, were both in bed, and at rest in an upper chamber of the mansion-house of the said Richard Heydon; and that the said William Edmonds then was, and yet is, the servant and apprentice of the said Richard; and that he then lay in another chamber of the said house, remote from the bed-chamber of his said master and dame; and that there was a door with a latch at the stairs-foot of the said bed-chamber of the said Heydon, but none at the stairs-head, being the entrance into the said bed-chamber of the said Heydon: We find that the said William, at the said time in the indictment, drew the latch of the stair-foot door, and opened the said door, being then latched, and went up the stairs, and entered the bed-chamber of his said master, with an intent to murder the said Heydon; and that he did then and there" wound, &c. Of the ten judges to whom the case was submitted, nine "agreed that it was burglary," and the other doubted. Similar to this are the cases of *Gray* (1 Strange, 481), and *Bowen* (4 Cranch Cir. C. 604), in which the judgments were the same.

In *Cornwall's case* (2 Strange, 881), "defendant was a servant in the house where the robbery was committed, and, in the night time, opened the street door, and let in the other prisoner, and showed him the side-board, from whence the other prisoner took the plate: then the defendant opened the door, and let him out, but did not go out with him, but went to bed." Whether this was burglary in the servant, was doubted at the trial; but, at a meeting of all the judges, they unanimously held, "that it was burglary in both, and not to be distinguished from the case that had been often ruled, . . . that if one watches at the street-end while the other goes in, it is burglary in all."

In this latter case, the servant did not break into and enter the house: he was already in, and did not go out; and the other did not himself do any house-breaking to get in: he only entered through a door, which a servant of the house, intrusted with the key, opened for him. But the idea, though not expressed, upon which this opinion was based, seems to have been, that the outsider was guilty of burglary in obtaining entrance by the aid of the unfaithful servant, as

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truly as if it had been effected by an inanimate instrument; and it followed, that the servant was guilty of the same offense, because he was present, aiding and abetting. Would there have been any question made, whether the servant was guilty or not, if, instead of being and staying within the house, he had come with his confederate to the door, on the outside, and had opened it with the key intrusted to him, and both had gone in and stolen the plate? If not, why should not the servant, in view of the other cases above cited, be held guilty of burglary, if without a confederate he had opened and gone into the house alone, and immediately stolen the plate, himself? An opening for this purpose was no less unlawful, and it would appear as much a burglary, as an opening to let in another thief. By the common law, a servant would be guilty of larceny—of the felonious *taking* and carrying away—of the money or goods of his master, even if they had been handed and intrusted to him to be carried to another person, by appropriating them to his own use. And so, though he might have the privilege of opening and entering his master's mansion-house, to go to bed therein, he would, it seems to me, be guilty of burglary, if he unlocked and entered it in the night time, with the intent to rob, and did then commit robbery therein; only, to justify a conviction in such a case, the jury ought to be satisfied by the evidence, beyond a reasonable doubt, that the intent to rob existed when the house was entered, not formed afterwards.

Doubt is cast upon this view, by a passage of Sir Matthew Hale's, in commenting on some statutes of Elizabeth's reign, in which he says: "If the servant unlatch a door, or turn a key in a door in the house, and steal goods out of that room; . . . yet, it seems to me, the servant shall not thereupon be ousted of his clergy, for the opening the door in this manner is within his trust, and so no breaking of the house, nor robbery, within this act. . . . But, if a servant break open a door, whether outward or inward, . . . and steal goods, this is a robbery and breaking the house within this statute; . . . for such a breaking, though by a servant, in the night, would make burglary; for such an opening is not within his trust."—2 Hale's P. C. 354, 355. Of these passages, it is remarked in Russell on Crimes (Sharswood's ed. of 1877), vol. II, p. 11: "It seems to have been considered, that the question whether such act would amount to a breaking, must depend upon the point, whether the door might have been opened by the servant in the course of his trust and employment." But doubt of this is intimated in a note, added with a *sed quere*, and reference

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to *Edmonds's case, supra*. We have, therefore, supposed we might consider the question as not settled by the passage in the Pleas of the Crown.

We are of the opinion, that the charge given by the judge of the City Court to the jury was, upon this point, as favorable to the appellant as the law would allow. Of course, if he went in only to go to bed, and had the right to do so from his employers, or was accustomed to sleep there at night with their knowledge, and without objection, he would not be guilty of burglary, though, after entering the office for that purpose only, he formed the design to steal.

The charge was asked for appellant, and refused, that upon the evidence they must find the defendant not guilty. And we think it ought to have been given. There was no evidence that defendant had opened the door of the office at all, for there was none that it was shut before he entered.

For the error of refusing this charge, the judgment of the Circuit Court must be reversed, and the cause be remanded. Let the defendant remain in custody, until discharged by due course of law.

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Indictment for Selling Liquor to Person of Known Intemperate Habits.

1. *Sufficiency of indictment.*—An indictment for selling liquor to a person of known intemperate habits, in the form prescribed by the Code (p. 998, No. 59), is sufficient, although it does not negative the requisition of a physician.

2. *Selling liquor to person of known intemperate habits: constituents of offense.* To authorize a conviction under an indictment for selling liquor to a person of known intemperate habits (Code, § 4205), it is essential that three facts shall be proved: 1st, that the defendant sold spirituous, vinous, or malt liquor to the person named; 2d, that such person was of intemperate habits; and, 3d, that the defendant had knowledge of his intemperate habits.

3. *Same; how proved.*—Neither the sale of the liquor, nor the intemperate habits of the person to whom it was made, can be proved by general character, general reputation, or general notoriety in the community; but such evidence is admissible to prove the defendant's knowledge of such intemperate habits, on the theory that what is generally known in the community is evidence, to be weighed by the jury, in determining whether it is known to the accused; yet such evidence is not conclusive.

4. *Measure of proof, and reasonable doubt.*—As to the measure of proof required in criminal cases, and the reasonable doubt which will justify an acquittal, the correct rule is laid down in the case of *Coleman v. The State*, 59 Ala. 52; and that rule applies to a prosecution for selling liquor to a person of known intemperate habits.

5. *"Intemperate habits"; what constitutes.*—"Intemperate habits," within the

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meaning of the statute, can not be predicated of a person who occasionally drinks to excess. But it is not necessary to show that he is drunk every day. If sobriety is the rule, and occasional intoxication the exception, he is not within the statute; and, on the other hand, if the habit is to drink to intoxication when occasion offers, and sobriety or abstinence is the exception—as when one is accustomed to remain sober while at home, but generally drinks to excess when in company, or when visiting the town or village—the charge of intemperate habits is sustained.

6. *To what witness may testify.*—Intemperate habits is a collective fact, to which a witness may testify, if he has sufficient knowledge; and the person to whom the liquor was sold may himself testify whether he is or is not of intemperate habits.

7. *Same.*—A person, knowing the fact, may testify that the intemperate habits of the person to whom the liquor was sold were generally known in the neighborhood in which the sale was made.

FROM the Circuit Court of Perry.

Tried before the Hon. GEO. H. CRAIG.

The indictment in this case was found in March, 1879, and charged that the defendant, "John Tatum, before the finding of this indictment, did sell or give spirituous, vinous, or malt liquors, to John Liddell, a person of known intemperate habits; against the peace," &c. The defendant demurred to the indictment, "because it fails to allege that the gift or sale was made without the requisition of a physician;" but the court overruled the demurrer, and he then pleaded not guilty. The demurrer, and the ruling of the court thereon, are not noticed in any judgment-entry, but only appear from the bill of exceptions.

On the trial, as the bill of exceptions states, John Liddell was introduced as a witness for the State, and testified, that he purchased whiskey from the defendant in June, or July, 1878, and that he was the person named in the indictment as a man of known intemperate habits. On cross-examination of this witness, the defendant asked him these questions: "Did you not, in the months of June and July, 1878, and often prior to that time, come to town, having plenty of money with which to buy whiskey, and did not purchase and drink it?" "Did you not frequently, at said time, and previous thereto, have opportunities of indulging in whiskey, and did you not decline to indulge?" To each of these questions the counsel for the State objected, not stating any particular ground of objection, and the court sustained the objections; to which rulings exceptions were duly reserved by the defendant. The defendant also asked the witness, "if he was, or believed himself to be, a man of intemperate habits, when he purchased the liquor;" to which question, also, the court sustained an objection on the part of the State, and the defendant excepted. J. L. Wyatt, another witness for the State, testified, "that he knew said John Liddell, and had heard several men, prior to June, or July, 1878,

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discuss his character; that he thought he knew the general character of said Liddell, as being a temperate or intemperate man; and that his character generally, in the community of Marion, was that of an intemperate man. The defendant moved the court to exclude this answer, on the ground that it was illegal and irrelevant; but the court overruled the motion, and the defendant excepted." John Howze, another witness for the State, was asked, "if he knew the general character of said John Liddell for temperance during the months of June and July, 1878, and prior to that time;" and answered, "that he thought said Liddell had two characters—when at home, he had the character of a sober, industrious man; and when in town, he had the character of being an intemperate man." The defendant objected to this question, and reserved an exception to its allowance; but no objection was made to the answer. Numerous other exceptions, of similar character, were reserved by the defendant to rulings of the court on questions of evidence; which, however, require no special notice.

The court gave an elaborate written charge to the jury, which it is unnecessary to set out at length. To the following portions of this charge exceptions were duly reserved by the defendant, a separate exception being taken to each sentence as here copied: "A man of intemperate habits is one who is in the habit frequently of getting drunk; and if it is known to the person selling him liquor, he is a man of known intemperate habits." "A man who is in the habit of getting drunk two or three times a year, is a man of intemperate habits; and if any one sells or gives whiskey to such a person, knowing (when he does so) the habits of the person to whom he sells or gives it, he is guilty, under the statute, of selling or giving to a person of known intemperate habits." "If the State has proved to your satisfaction that Liddell's character in this community, at the time of the selling or giving, was that of a man of intemperate habits, the jury may infer from such proof that the defendant knew the character of said Liddell." "If said Liddell was frequently in the town of Marion, during the time mentioned, in 1878, prior to June and July of that year, and was frequently or occasionally drunk on the street, and, while in that condition, frequently passed near the defendant's bar-room, or went into said bar-room, while in that condition; the jury may, from these facts, if they be proven, infer that defendant knew of said Liddell's intemperate habits." "This man is charged with a grave offense against the law; if he is guilty, you should assess a fine that will reform him, and prevent him from ever again breaking the laws of his country; and such

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a fine as will warn others against the commission of a like offense by any one else in the community." "A refusal to enforce the law vigorously by juries, whenever the person charged with breaking it is fully proved guilty, will embolden the drunkard to drink the more, and those who sell it to him to defy the law." "If morally certain of his guilt, the jury should not hesitate to punish, and punish severely." "You will be morally certain, when you can say that his guilt is fully proved ; for there can be no reasonable doubt, if guilt is fully and clearly established."

The defendant requested numerous charges to the jury, which were in writing, and some of which were given by the court as asked, while others were refused. Among the charges refused were the following: 1. "There are several material facts to be established by the State in this case; among them, that the person to whom the liquor was sold was, at the time of the sale, an habitual drunkard, and that the defendant knew this fact of his own knowledge at the sale; and unless the jury are satisfied from the evidence, beyond a reasonable doubt, that the defendant, when he sold the liquor, knew of his own knowledge that the purchaser was a man of intemperate habits, they are bound to acquit the defendant." 2. "If there is such a conflict in the testimony of the witnesses for the State and the witnesses for the defendant, as to create a reasonable doubt, whether the person to whom the liquor was sold was, at the time of the sale, an habitual drunkard, or not, the jury should acquit the defendant." 3. "If there is such a conflict between the testimony of the witnesses for the State and the witnesses for the defendant, as to create a reasonable doubt, whether the defendant, at the time of the sale, knew the person to whom he sold the liquor to be a man of intemperate habits, the jury should acquit the defendant." 4. "When witnesses for the State, and witnesses for the defendant, are of equal credibility and intelligence, and have equal opportunities of observing a certain state of facts, and they contradict each other as to those facts, these facts being material to the case; the rule of the law is, that the State has failed to make out her case, and the defendant should be acquitted." 5. "The jury may infer, from the facts that Liddell was seen by Bennett drunk twice, and by Howze two or three times, and by Lovelace three times," &c. (specifying in like manner the names and testimony of several other witnesses), "and no evidence showing whether these were the same or different occasions, that the defendant knew said Liddell was a man of intemperate habits; but, from these facts, and the further fact that said Howze, Lovelace, Wyatt and Nichols testified that said Liddell had the character of

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a man of intemperate habits, the jury are not bound to infer that his intemperate habits were known to the defendant." To the refusal of these charges, with others, exceptions were duly reserved by the defendant.

BROWN & HOGUE, and W. B. MODAWELL, for the defendant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The indictment in this case pursues the given form, and is sufficient.—Code of 1876, page 998, form 59. It is framed under section 4205 of the Code, and charges that the defendant sold or gave spirituous, vinous, or malt liquors, to a person of known intemperate habits. Three essential facts must have been established to the satisfaction of the jury, beyond a reasonable doubt, to authorize a conviction: first, that there was a *sale* or *gift* of spirituous, vinous, or malt liquor; second, that the sale or gift was to a *person of intemperate habits*; third, that at the time the seller or giver *knew* the person to whom he furnished the liquor was of intemperate habits. The first and second of these essential facts must be proved as any other material facts in a criminal prosecution are proved. They can not be proved by general character, general reputation, or general notoriety in the community in which the offense is alleged to have been committed; and this species of testimony is not admissible to prove either of these constituents of the offense. Only evidential facts and circumstances can be given in evidence, in support of these two propositions. The other element of the offense falls under a different rule. Knowledge is the fact to be proved—the defendant's knowledge of the intemperate habits of the person to whom he made the sale. On this question, general reputation, general character, may be introduced in evidence.—*Stallings v. The State*, 33 Ala. 425; *Price v. Mazange*, 31 Ala. 701; *Elam v. The State*, 25 Ala. 53. Such testimony, however, is not conclusive. It is received on the theory, that what is generally known in the community—so known, as to have established a general character or reputation—furnishes evidence to be weighed by the jury, in determining whether the accused had the requisite knowledge. If, upon all the evidence, including this proof of general character, the jury are convinced, beyond a reasonable doubt, that the defendant did know the intemperate habits of the person to whom he was selling or giving the liquor, then this third element of the offense is proved according to the requirements of the law. If the proof falls short of this measure of conviction, there should be an ac-

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quittal.—*Smith v. The State*, 55 Ala. 1; *Atkins v. The State*, 60 Ala. 45.

In *Coleman v. The State*, 59 Ala. 52, we stated the doctrine of reasonable doubts, and the measure of proof required in criminal cases. That rule applies in the ascertainment of every material fact, necessary to make up the defendant's guilt in this case, including the three essential elements commented on above. Each must be affirmatively shown to a moral certainty, so as to convince the jury of the truth of each, beyond a reasonable doubt.

What is meant by the expression in the statute, "intemperate habits?" Habit is defined to be, "Fixed or established custom; ordinary course of conduct."—Webst. Dic. It need not be the uniform or unvarying rule, but, to be a habit, it must be the ordinary course of conduct—the general rule or custom. It may have exceptions. Exceptions do not destroy a rule. But, unless, when occasion offers, there is a disposition, or probable inclination, to drink to excess, intemperate habits can not be predicated. If sobriety is the rule, and occasional intoxication the exception, then the case is not brought within the statute. On the other hand, if the rule or habit is to drink to intoxication when occasion offers, and sobriety or abstinence is the exception, then the charge of intemperate habits is established. Now, to make out this charge, it is not necessary that this custom shall be an every-day rule. There are persons whose custom is to remain sober while at home, and who, when in company, or visiting the town or village, generally drink to excess, although occasionally they abstain, and remain sober. In such case, drunkenness is shown to be the rule, or ordinary course of conduct; and to sell or give to such person, knowing him to be such, spirituous, vinous, or malt liquors, is a violation of the statute.—*Smith v. The State*, *supra*.

Intemperate habits is a collective fact, to which a witness may testify. We can perceive no reason why the person to whom the sale is alleged to have been made, should be made an exception to the rule. All persons, having sufficient knowledge, should be allowed to testify that the alleged purchaser of the liquor was, or was not, a person of intemperate habits. So, all persons knowing his general character in the premises, should be heard to testify whether his intemperate habits were, or were not, generally known in the community in which the sale or gift was made. All this is legal evidence, to be weighed by the jury. If, under these rules, the defendant is found guilty, the injury done to society, and especially to the family of the inebriate, if he has one, calls for firm, if not exemplary, administration of the law.

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In defining what constitutes intemperate habits, and in refusing to give some charges asked, defining the measure of proof necessary to authorize conviction, the Circuit Court erred. There may be other rulings subject to criticism, but we consider it unnecessary to specify them. What we have said will furnish a sufficient guide on another trial.

Reversed and remanded. Let the defendant remain in custody, until discharged by due course of law.

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Prosecution for Petit Larceny.

1. *Certiorari; when allowed at common law.*—A *certiorari*, at common law, was a revisory remedy, intended only for the correction of errors of law apparent on the record; and was not a substitute for an appeal, nor allowed for the correction of errors of fact, which were properly revisable on appeal.

2. *Same; under statute.*—In this State, a party has the right by statute to sue out a *certiorari*, to remove a judgment rendered against him by a justice of the peace, into the Circuit or City Court, when the right of appeal has been lost, without fault on his part, by lapse of time; and the cause is tried *de novo* in that court, without regard to the regularity of the proceedings before the justice, or the sufficiency of the petition for the *certiorari*. But the statute applies only to civil causes, and there is no statute which gives a *certiorari* in a criminal case, to remove a judgment rendered by a justice of the peace.

3. *Appeal from justice of the peace; when barred.*—In a criminal case tried before a justice of the peace, in a matter within his jurisdiction, the defendant has a right of appeal, under the rules and regulations prescribed for the trial of appeals from the County Court (Code, § 4701); and no time being prescribed within which the appeal must be taken, the right is only lost by the lapse of time which would bar an appeal to this court.

FROM the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The defendant in this case was arrested under a warrant, issued by a justice of the peace, charging him with the offense of petit larceny; and on his trial before the justice, on the 14th January, 1880, he was convicted, and sentenced to hard labor for the county for the term of six months. Thereupon, on the 16th January, 1880, he presented his petition for a *certiorari* to Judge MINNIS, asking the removal of the case into the City Court; and in his petition he stated, "that he did not at once take an appeal from the decision of the said justice, because he was informed and believed that said justice had exceeded his jurisdiction in passing sentence upon petitioner." A *certiorari* was granted as prayed, and the papers in the cause were returned into the City Court.

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At the next ensuing term of that court, the prosecuting attorney filed a statement, or complaint, charging the defendant with the offense of petit larceny. The defendant moved to strike the complaint from the files, but the court overruled his motion; and the plea of not guilty being interposed, the trial proceeded, and he was again convicted. To the refusal of the court to strike the complaint from the files, and to several rulings of the court during the trial, the defendant duly excepted; and on the exceptions thus reserved, the case is brought to this court.

J. M. FALKNER, for the defendant.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—A *certiorari*, at common law, was an original writ, issuing out of Chancery, or the King's Bench, directed in the king's name, to the judges or officers of inferior courts, commanding them to return the record of a cause depending before them, to the end the party may have the more sure and speedy justice, before him, or such other justice as he shall assign to determine the cause.—2 Bac. Abr. 162. In its nature it was a revisory remedy, intended only for the correction of errors of law, apparent on the record.—*Lamar v. Commissioners*, 21 Ala. 772; *Glaze v. Blake*, 56 Ala. 379. It was not a substitute for an appeal, nor intended for the correction of errors of fact.—*State v. Stewart*, 5 Strobb. S. C. 29. Indeed, it would not lie “where an appeal is given, if the objection be not to the want of jurisdiction, but to the merits; for that is more properly the subject of an appeal.”—2 Bac. Abr. 165.

In civil causes, a party has by statute the right, by *certiorari*, to remove a judgment rendered against him by a justice of the peace, into the Circuit or City Court, when, by the lapse of time, without fault on his part, the right of appeal has been lost. When the cause is introduced into the Circuit Court, it is tried *de novo*, on the merits, as if an appeal had been taken, without regard to the regularity of the proceedings before the justice, and without an inquiry whether the petition disclosed proper cause for awarding the writ.—1 Brickell's Dig. p. 111, § 21.

It is, however, in civil causes only that the statute gives the remedy. When there is a judgment of conviction in a criminal cause, of which a justice had jurisdiction, the defendant has a right of appeal, under the rules and regulations prescribed for the trial of appeals from the County Court. The cause, when carried into the Circuit or City

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Court, is tried *de novo*, on the merits.—Code of 1876, § 4701. No time is prescribed for the taking of the appeal, as in civil causes; and the right can only be lost by the lapse of the period which would bar an appeal to this court.—*Mason v. Moore*, 12 Ala. 578; *Enis v. Ross*, 19 Ala. 239.

The appellant, proceeding on the supposition that his right of appeal had been lost, because it was not claimed immediately on the rendition of the judgment of conviction, applied to and obtained from the judge of the City Court a writ of *certiorari*, to remove the judgment of conviction, not assigning any error of law in the proceedings of the justice. The petition is based wholly on the idea, that, as in civil causes, a *certiorari* is an appropriate remedy to remove the cause into the City Court for a trial *de novo* upon the facts. The statute does not authorize the proceeding, and by giving an appeal, excludes it as an appropriate remedy. The City Court was without jurisdiction in the premises. The writ ought to have been quashed, and a *procedendo* awarded to the justice of the peace.

The judgment is reversed, and the cause remanded for proceedings in conformity to this opinion. The prisoner will remain in custody, until discharged by due course of law.

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Indictment for Burglary.

1. *Quashing indictment, that another may be preferred.*—When the record shows an irregularity in the organization of the grand jury, for which a judgment of conviction would be reversed on error or appeal, although the defect is not discovered until after the trial has commenced, the court may quash the indictment (Code, § 4819), and order the case to be brought before another grand jury.

2. *Jeopardy.*—A defendant, in a criminal case, is never in jeopardy, when the indictment against him is so invalid that a judgment upon it would be annulled on appeal, no matter what may be the stage of the prosecution when, for that reason, it is quashed.

3. *Limitation of prosecution: when statute is suspended.*—When an indictment is quashed, on account of a defect in the organization of the grand jury, and another indictment is preferred, "the time which elapsed between the finding of the first and the subsequent indictment must be deducted from the time limited by law for the prosecution of the offense," (Code, § 4820). The expressions used in the case of *Finley v. The State* (61 Ala. 201), as to the utter invalidity of an indictment found by a body of men not legally organized as a grand jury, are not to be construed as meaning that such an indictment would not suspend the running of the statute of limitations as above provided.

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FROM the Circuit Court of Hale.

Tried before the Hon. GEO. H. CRAIG.

A. A. COLEMAN, for the defendant.

H. C. TOMPKINS, Attorney-General, for the State.

MANNING, J.—Appellant, for the offense of burglary, committed in February, 1876, was indicted at the Spring term of the Circuit Court in that year, by the grand jury, or the body of persons who were summoned, sworn, impanelled and charged to act as such, in that court. The cause was called for trial at the Fall term of the court in the year 1879; but, after a jury had been impanelled, and a witness sworn and examined, it was discovered that there was such an irregularity in the selection and composition of the grand jury, who returned the indictment, as would cause a reversal of the judgment after verdict, if rendered against the accused. Thereupon, the circuit judge stopped the trial, quashed the indictment, and ordered the case to be submitted for consideration to another grand jury; and they preferred the indictment on which the present cause is founded. To this indictment defendant refused to plead; and the plea of “not guilty” was entered by order of the court on his behalf.

Appellant’s counsel are mistaken in supposing that an indictment can be quashed, and the case be referred to another grand jury, for no other reasons than those assigned in sections 4815, 4816, and 4817 of the Code of 1876; that is, for “any defect or imperfection in any matter of form,” or “when the name of the defendant is incorrectly stated, or when any person, property, or matter therein stated, is incorrectly described,” and defendant refuses consent that the indictment be perfected by amendment. According to section 4819, “When the judgment is arrested, or the indictment quashed on account of any defect therein, or *because it was not found by a grand jury regularly organized*, or because it charged no offense, or *for any other cause*, the court may order another indictment to be preferred for the offense charged, or intended to be charged.”

The first of these indictments was quashed for an irregularity disclosed by the record, in constituting the grand jury; an irregularity for which this court had, in a like case, decided that a judgment of the primary court thereon, against the defendant, must be reversed. It would have been wrong for a circuit judge, seeing that defect, to have suffered the

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trial to proceed to a judgment, which would have here been certainly vacated. *Lex neminem cogit ad vana seu inutilia.*

Nor can it be held, in such a case, that the proceedings had gone so far that defendant had been put in jeopardy, and should not, therefore, be subjected to trial again. A defendant is never in jeopardy, when the indictment against him is so invalid, that a judgment upon it would be annulled on appeal, no matter what may be the stage of the prosecution when, for that reason, it is quashed. Besides, there was no plea of former acquittal, which counsel say the proceedings on the first occasion amounted to, in this cause.

The contention founded on expressions in the opinion of *Finley v. The State* (61 Ala. 201), that the indictment first preferred was utterly void, as much so as a like accusation made by an unauthorized assemblage of men in the street would be, and so could not be regarded as an indictment in any sense, and therefore could not be set up to prevent the running of the statute of limitations of three years, cannot be sustained. We have before had occasion to comment on the interpretation put upon the opinion in that case: in which we decided, only, that the error committed in constituting the grand jury was so serious that, upon appeal to this court, we were compelled to pronounce the indictment they found void, and for that reason to set aside a judgment upon it against the defendant, and remand the cause for further proceedings according to law.—*Cross v. The State*, at this term. In the case now before us, as certain as in any other, "the time which elapsed between the finding of the first and the subsequent indictment, must be deducted from the time limited by law for the prosecution of the offense." Code, § 4820 (4147).

Let the judgment of the Circuit Court be affirmed.

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Prosecution for Unlawful or Wanton Killing of Stock.

1. *Madison County Court; when appeal lies*—Under the act "to regulate the trial of misdemeanors in Madison county," approved February 9th, 1877, an appeal lies directly to this court, from the judgments of said County Court, in criminal cases commenced in that court, as well as in cases transferred to it from the Circuit Court under the provisions of that act.

2. *Judgment on facts; when not reversed*—On appeal from the judgment of the County Court, in a cause which was tried before the judge without a jury,

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if the record shows that the judgment is founded upon conflicting oral testimony, this court will not disturb it, unless it is manifestly wrong.

3. *Proof of venue.*—When the bill of exceptions purports to set out all the evidence adduced, and shows no proof of the venue, a judgment of conviction will be reversed.

FROM Madison County Court.

Tried before the Hon. WILLIAM RICHARDSON.

This was a prosecution for unlawfully or wantonly killing a cow, the property of Mrs. Mattie McMullen, and was commenced and tried in the County Court. On all the evidence adduced, which is set out in the bill of exceptions, "the court found the defendant guilty, and fined him ten dollars;" to which judgment and decision the defendant duly excepted. It is unnecessary to state the evidence.

BRANDON & JONES, for the appellant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The regularity of the present appeal must be tested by the provisions of the act "to regulate the trial of misdemeanors in Madison county," approved February 9th, 1877.—Pamph. Acts, 149. The Attorney-General moves to dismiss the appeal, as not authorized by that act. The present proceeding is not of the class of cases transferred from the Circuit to the County Court, for which that act makes provision. It originated in complaint before, and warrant issued by the County Court, and, hence, was tried without an indictment. The point made by the Attorney-General is, that the section of the statute in question, giving an appeal directly to this court in the first instance, is limited and confined to cases which originate in the Circuit Court, by indictment found there, and are transferred to, and tried in the County Court.

The second section of the statute requires, that the presiding judge of the Circuit Court shall, on the day of adjournment of each term, enter on the minutes of his court an order requiring the clerk "to deliver to the judge of the County Court all indictments presented or filed in the Circuit Court, and not finally determined, against persons charged with misdemeanors, except violations of the revenue laws; and after the making of such order, the jurisdiction of the Circuit Court shall cease, and exclusive jurisdiction shall vest in the County Court." The third section makes the clerk of the Circuit Court, *ex officio*, clerk of the County Court, and prescribes his duties; one of which is, "where arrests have not

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been made, to issue *capias* forthwith, returnable to the first day of the next term of the County Court."

The fourth section of the act is as follows: "That it shall be the duty of the judge of the County Court to hear counsel, and decide these causes without a jury, unless the defendant demands a jury; but the question must be put to the defendant, whether he will have a jury; and if he waive a jury, it must be entered of record. But, if a jury is demanded, and in no other case, the court shall order the sheriff of said county to summon, *instantly*, twenty-four free- or householders of the county, from whom a jury shall be impaneled; the procedure of the trial, except as altered by this act, to be the same as is now provided by law for like cases in the Circuit Court." Section five relates to amendments of indictments. Section six makes certain provisions of the Code applicable to proceedings in the County Court of Madison. These relate to forfeitures against defendants, and against witnesses,—See sections 4710 to 4715, inclusive, Code of 1876. Section 4715, thus made applicable, directs that, "When a forfeiture has been taken against a defendant and the sureties on his bail-bond, it shall be the duty of the court to issue another warrant of arrest against the defendant," &c. Section seven provides, "that the defendant in all cases, whether tried by a jury, or by the court on waiving a jury, shall have the right of appeal to the Supreme Court only." Section eight makes it the duty of the solicitor of the judicial circuit, in which Madison county is situated, "to attend said County Court, either in person or by deputy, and prosecute for the State all cases therein," &c. Section nine requires four terms of the court to be held in each year, and fixes the time and duration of the terms. Section ten declares the compensation or fees the judge shall receive; and section eleven repeals "all laws and parts of laws in conflict with" the act we are considering.

The following clauses in this statute tend to confirm the view pressed by the Attorney-General: In section four, the duty cast on the judge, to "decide these causes without a jury, unless the defendant demands a jury;" in section six, the words, 'in all cases transferred as above;' and in section seven, the words, "the defendant in all cases, whether tried by a jury, or by the court on waiving a jury." These expressions, uninfluenced by others in the statute, tend to show that the enactment has exclusive reference to causes transferred from the Circuit to the County Court under its provisions. There are other clauses, however, not reconcilable with this view. The caption of the act, "To regulate the trial of misdemeanors in Madison county;" the first sec-

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tion, which confers on the County Court "concurrent jurisdiction with the Circuit Court of said county, for the trial of all misdemeanors, except violations of the revenue laws;" the clause, in section three, which provides for a clerk of said County Court; the words, "in all cases," found in section seven; the duties cast on the solicitor of the circuit in section eight; changing the terms from monthly to quarterly, in section nine; the repealing clause in section eleven—all these indicate a purpose to effect a radical change in the organism and functions of the court, and to elevate its jurisdiction to a much higher grade. In the County Court of Madison, as re-constituted under this statute, it is evident that monthly terms are abolished, and quarterly terms substituted in their stead; a clerk of the court is created, and it is made the duty of the solicitor to attend its sittings. It would scarcely be contended that the functions of the clerk and solicitor are limited to causes transferred from the Circuit to the County Court; and yet, the argument in favor of such position would seem as plausible, as that which impliedly asserts, at least, that the old, unchanged rule as to trial and appeal still obtains in causes originating in the County Court, while, in transferred causes, the new and entirely different rule must be observed. We have found difficulty in arriving at any satisfactory interpretation of this statute; but, looking to what appears to be the general intent of the law, and consulting the harmony of proceedings in the Madison County Court, we hold that the main provisions of the statute under discussion, which relate to trials in, and appeals from that court, are applicable to all criminal trials had therein. This includes the right of the defendant to have his cause tried by a jury, unless he waives it. The motion to dismiss the appeal must be overruled.

2. In the trial of this cause in the County Court, there was some conflict in the testimony. The testimony of Mrs. McMullen tended to prove the cow or yearling was her property. Her testimony was somewhat corroborated by other testimony given. Other witnesses were examined, as to prior conversations had by her, which, if believed, were calculated to weaken, if not discredit her evidence. The judge of the County Court had these witnesses before him, and could observe their manner of testifying, as well as the intelligence with which they made their statements. His opportunities for weighing the testimony were much better than ours; and he found the defendant guilty. We will not reverse his judgment on the facts so found and pronounced, unless it is manifestly wrong.—*Harwood v. Harper*, 54 Ala. 659; 1 Brickell's Dig. 775, § 24: *Ex parte McAnally*, 53 Ala. 495; *Ex parte*

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Nettles, 58 Ala. 268. There is not enough in this record to justify us in reversing the finding of the County Court on this question.

3. On one point the judgment of the County Court must be reversed. The bill of exceptions states that it contains all the evidence. There is no testimony that the cow was killed in Madison county. This was indispensable.—*Frank v. The State*, 40 Ala. 9; *Bain v. The State*, 61 Ala. 75.

Reversed and remanded. Let the prisoner remain in custody, until discharged by due course of law.

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Scire Facias against Bail, on Forfeited Recognizance.

1. *Sheriff's authority to admit to bail.*—On executing a warrant of arrest, issued by a justice of the peace, for a misdemeanor which he has not jurisdiction to try, the sheriff may take bail for the appearance of the defendant at the next term of the court having jurisdiction of the offense, or at the term then being held when the court is in session (Code, § 4659); but a recognizance taken by him, conditioned for the appearance of the defendant before the justice, on a day specified in the warrant, is without statutory authority, and void.

APPEAL from the Circuit Court of Hale.

Tried before the Hon. GEO. H. CRAIG.

The record in this case shows that, on the 17th January, 1877, a warrant of arrest was issued by a justice of the peace against Henry Johnson, founded on an affidavit charging him with the offense of trespass after warning, and commanding that he be brought before the justice on the 24th day of that month, to answer the offense. The warrant was executed by the sheriff, whose return was in these words: "I have executed this writ by arresting the within-named defendant, and admitting him to bail, this 18th day of January, 1877;" and he also returned the recognizance, or bail-bond, which was signed by said Johnson, with N. B. Jones and Madison Jones, and was conditioned for Johnson's appearance before the justice, on the day named in the warrant, "and from term to term thereafter until discharged, to answer the charge of trespass after warning, preferred against him by T. B. Randolph." Johnson failed to appear before the justice, who thereupon certified the failure to the Circuit Court, on the 12th October, 1877. In that court, on the 21st October, 1878, a *scire facias* was ordered to issue to the recognizers; and

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it was duly issued on the 17th January, 1879, and was returned "Executed by serving copies on all parties, this 6th March, 1879." The recognizors appeared, in answer to the *sci. fa.*, and moved to strike the case from the docket, on the ground that it had been discontinued; which motion being overruled, they demurred to the *sci. fa.*, craving oyer of the recognizance and other papers in the case,* on the ground that the recognizance was taken without authority of law, and was void; and they moved to quash the proceeding against them on the same ground. The court overruled the demurrer and motion, and rendered judgment final against the recognizors; and this judgment, with the several rulings of the court to which they reserved exceptions, they now assign as error.

THOMAS SEAY, for appellants.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—The power and duty of a sheriff, to take recognizances in criminal cases, is derived from, and imposed by statute. A recognizance, taken by him without authority, is void.—*Governor v. Jackson*, 15 Ala. 703; *Antonez v. State*, 26 Ala. 81; *Gray v. State*, 43 Ala. 41. A warrant of arrest was issued against Henry Johnson, by a justice of the peace, to answer an accusation of trespass after warning,—a misdemeanor. The warrant was, by its terms, returnable before the justice, on a day specified, seven days after its issue, and six days after its service by the arrest of the defendant. The offense charged was not one of the misdemeanors of which the justice had final jurisdiction. The only jurisdiction he could exercise, was that of inquiring whether the offense had been committed, and whether there was probable cause to believe the defendant guilty of it; and to hold him to bail, or, in default thereof, to commit him to answer at the next term of the Circuit Court. The sheriff, or his deputy, on executing the warrant, could, if the defendant had requested, have taken bail for his appearance at the next term of the court having jurisdiction of the offense, to answer any indictment therefor found against him; or, if the court was in session, for his appearance at such court.—Code of 1876, § 4659. This is the only recognizance the sheriff had authority to take. Instead of exercising it, the sheriff discharged the defendant from custody, on a recognizance to appear before the justice on the day named. The recognizance was void, and should have been so pronounced by the

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Circuit Court, and the proceedings against the recognizers discharged.

The judgment is reversed, and a judgment here rendered discharging the recognizers.

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Indictment for Rape.

1. *Organization of grand jury; supplying deficiency of original panel.*—In the organization of the grand jury, when less than fifteen of the original panel appear and are accepted, the deficiency should be supplied by summoning twice the requisite number “from the qualified citizens of the county” (Code, §4754); and when the record shows that they were summoned, under the order of the court, “from the bystanders,” the irregularity will work a reversal of a judgment of conviction under an indictment found by the grand jury thus constituted.

2. *Depositions in criminal cases.*—The statutory provisions which authorize the taking of depositions in criminal cases (Code, §§4932-35), apply only to cases pending in court, and not to preliminary examinations before committing magistrates.

FROM the Circuit Court of Chambers.

Tried before the Hon. JAMES E. COBB.

The record in this case shows that, in the organization of the grand jury by which the indictment was found, four of the original panel having been excused by the court, “which reduced the number to fourteen, the court thereupon ordered the sheriff to summon, from the by-standers, five talesmen, from whom to select two more jurors;” and that the jury was completed by the addition of two of the persons thus summoned. The indictment charged, in its first count, that the defendant “forcibly ravished Belle Williams, a female;” and on this count, to which he pleaded not guilty, he was convicted, and sentenced to the penitentiary for life. On his trial, as appears from the bill of exceptions, he offered in evidence, for the purpose of proving his good character, the deposition of one Marcram, which had been taken on interrogatories and cross-interrogatories, under a commission issued by the judge of probate of said county, “while this case was before him on preliminary examination, and before the indictment was preferred.” On objection by the State, the court refused to allow the deposition to be read as evidence; and the defendant excepted to its exclusion. This is the only ruling to which an exception was reserved.

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GEO. W. HOOPER, for the defendant.

H. C. TOMPKINS, Attorney-General, for the State.

MANNING, J.—In this case, the persons summoned as grand jurors having, by excuses allowed, been reduced below the number fifteen, the judge, instead of having an order entered, “commanding the sheriff to summon, from the *qualified citizens of the county*, twice the number of persons required to complete the grand jury,” “ordered the sheriff to summon *from the by-standers* five talesmen from whom to select two more jurors,” &c. The case is thus brought within the decision made in *Finley v. The State* (61 Ala. 201), according to which, the grand jury was not lawfully constituted, and the indictment it preferred must be quashed.

2. There was no error in ruling out the depositions taken for defendant. It is in cases pending in court, not examinations before committing magistrates, that the deposition must be taken, which the law allows to be read as evidence on the trial.

For the error above indicated, the judgment must be reversed, and the cause remanded. Let the defendant remain in custody, until discharged by due course of law.

Farrish v. The State.

Indictment for Grand Larceny.

1. *Reasonable doubt; charge requiring explanation*—Although, in criminal cases, as a general proposition, “it is safer to acquit, in cases of doubt, than to convict;” yet a charge asked, asserting that proposition, is properly refused, because, without explanation, it is calculated to mislead the jury.

FROM the Circuit Court of Tuskaloosa.

Tried before the Hon. WM. S. MUDD.

The indictment in this case charged that the defendants, Martin Farrish and Dennis Ballard, “feloniously took and carried away two hogs, the personal property of James A. Duren, of the value of fifteen dollars; against the peace,” &c. The defendant Farrish, being on trial alone, pleaded not guilty; and issue was joined on that plea. “On the trial,” as the bill of exceptions states, “the testimony of several witnesses tended to show that said Farrish and Ballard

[Farrish v. The State.]

feloniously took and carried away two hogs, which were the property of James A. Duren, and were worth fifteen dollars; and that said transaction occurred in said county, in the spring of the year 1876. The evidence was circumstantial in its character, so far as it implicated the defendant Farrish, or tended to implicate him. This was all the evidence. The court charged the jury, and no exception was taken to its general charge. The defendant then requested the court, in writing, to charge the jury as follows: 'It is an established rule of the criminal law, that in cases of doubt it is safer to acquit than to convict.' The court refused to give this charge as asked, and the defendant excepted to its refusal."

H. M. SOMERVILLE, and S. A. M. WOOD, for defendant, cited Burrill's Cr.Ev. 739, ed. 1868; 2 Hale's P. C. 289.

H. C. TOMPKINS, Attorney-General, for the State, cited *Coleman v. State*, 59 Ala. 52; *Bernstein v. Humes*, 60 Ala. 582.

STONE, J.—Elementary writers, in speaking of the measure of proof necessary to insure conviction in a criminal case, have frequently said, "in cases of doubt, it is safer to acquit than to convict or condemn."—Best on Ev., sections 49, 95, 440; 2 Hale's Pl. Cr. 289. This is but the complement of that other maxim, often quoted, and sometimes perverted, "that it is better that many guilty persons should escape, than that one innocent person should be made to suffer." Mr. Best, in his excellent treatise on Evidence, section 95, speaking of these maxims, says, they "are often perverted to justify the acquittal of persons, of whose guilt no reasonable doubt could exist." He adds: "There are other maxims which should not be forgotten: 'It is the interest of the commonwealth that malefactors do not go unpunished'; and, 'He threatens the innocent, who spares the guilty.'" The language we are criticising declares a safe and humane rule for the guidance of both courts and juries. Neither the law nor the exigencies of society demand or approve the punishment of the innocent, or of the doubtfully guilty. Doubts are resolved in favor of the accused. Juries should never convict, until the fact of guilt is made morally certain by the evidence. This is the mandate of the law, and is the birthright of both the English and the American citizen.

But, in trials on criminal accusations, it is not every species of doubt that calls for an acquittal. "A doubt which requires an acquittal, must be actual and substantial, not mere possibility, or speculation." It must be a reasonable

[Grimes v. The State.]

doubt; "that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jury in that condition, that they cannot say they have an abiding conviction, to a moral certainty, of the truth of the charge."—*Coleman's case*, 59 Ala. 52. There are degrees of doubt, as there are of most mental convictions. Moral certainty, excluding all reasonable doubts, is the measure of proof required in criminal cases.

The charge asked in this case was calculated to mislead. It did not discriminate between the degrees of doubt, nor define the doubt which would require or authorize an acquittal. In laying down a rule for the government of a jury, accuracy, clearness, and precision should be studied and sought after. It is never a reversible error to refuse a charge, the tendency of which, unexplained, is to mislead, or which, considered in connection with the evidence, requires explanation of one or more of its propositions to render it a safe and certain guide for the jury.—*Duvall & Pelham v. The State*, at the present term; *Bernstein v. Humes*, 60 Ala. 582; *Durr v. Jackson*, 59 Ala. 203; *Green v. The State*, *ib.* 68; *Washington v. The State*, 58 Ala. 355; *Thrash v. Bennett*, 57 Ala. 156; *McWilliams v. Rodgers*, 56 Ala. 87. The charge asked and refused in this case correctly states, "in cases of doubt, it is safer to acquit than to convict." In failing, however, to define the character or degree of doubt which demands the acquittal, the proposition, as an instruction to the jury, is faulty.

The judgment is affirmed.

Grimes v. The State.

Indictment for Arson.

1. *Discredited witness; weight of testimony of.*—There is no maxim of the law of evidence which requires greater caution in its application, than that which affirms that a witness, intentionally giving false testimony as to any material fact, is to be wholly discredited by the jury; and this court "follows the authorities which hold that it is not a rule of law, affecting the competency, operating a disqualification of the witness, to be given in charge to the jury as imperatively binding them, but is to be applied by them, according to their sound judgment, for the ascertainment, and not for the exclusion of truth."

2. *Arson; constituents of offense.*—Setting fire to a store-house, with the intent that the fire should be communicated to, and should burn, a dwelling-house situated near by, is, in law, deemed the burning of the latter.

FROM the Circuit Court of Russell.

[Grimes v. The State.]

Tried before the Hon. JAMES E. COBB.

G. D. & GEO. W. HOOPER, for the defendant, cited Starkie on Evidence, 873.

H. C. TOMPKINS, Attorney-General, for the State, cited 2 Wharton's Amer. Crim. Law, §§ 1658, 1669; *Corley v. The State*, 28 Ala. 22; *Addison v. The State*, 48 Ala. 478.

BRICKELL, C. J.—The defendant was indicted, in the form prescribed, for arson in the second degree, under the clause of section 4347 of the Code of 1876 which declares, that “any person who willfully sets fire to, or burns, any inhabited dwelling-house, or any steamboat, or vessel, in which there is at the time no human being, is guilty of arson in the second degree.” The bill of exceptions, without purporting to set out all the evidence, informs us there was evidence showing that two houses were burned; the one, a house used for storing corn and fodder, to which fire was set, situated some ten or twelve steps apart from the inhabited dwelling-house, which was burned in consequence of taking fire from the store-house. Two witnesses proved threats to burn the houses, made by the defendant; and one of them also proved his proximity to the houses at the time of the burning; that the fire occurred about 8 or 9 o'clock at night; that the moon was shining brightly, and he saw the defendant distinctly. The hostile feelings of the defendant to the owner of the houses were otherwise proved. One of these witnesses, having disclaimed ill-feeling towards the defendant, stated, on cross-examination, that he was assisting in the prosecution, and had told the officer where the defendant could be found and arrested; that since the commencement of this prosecution, the defendant had cursed him, and had commenced against him two malicious prosecutions, and that he had offered to fight the defendant. There was evidence introduced by the defendant, tending to show that he was not, and could not have been, present at the time the houses were set fire to and burned, nor where the witness for the State had testified seeing him; and that on the night of the burning, the moon did not rise until after 11 o'clock. The defendant requested seven instructions to the jury, which were refused. Five of these affirm, in varying forms of expression, that a witness who intentionally gives false testimony, as to any material fact, is to be wholly discredited by the jury. Two others affirm, in substance, that a conviction could not be had on proof that the fire was set to the store-house, and not to the dwelling.

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1. The credibility of witnesses is matter for the consideration of the jury, guided by such instructions from the court as the nature and character of the evidence, and the particular case, may require. No invariable and inflexible rule of law can, or ought to be, applied to all cases, and to all evidence. There is no maxim of the law of evidence requiring greater caution in its application, than that which was invoked by the defendant in the several instructions refused. It is said by Starkie: "As the credit due to a witness is founded on general experience of human veracity, it follows, that a witness who gives false testimony, as to one particular, cannot be credited as to any, according to the legal maxim, *falsum in uno, falsum in omnibus*. The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness' testimony cannot be partial, or fractional; when any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected." It is thus explained, that the falsity of the evidence must result from design, and not from mere mistake, or infirmity, which affects only the character of the witness for accuracy. Nor is it applied to evidence favorable to the party against whom the witness may be called.—1 Stark. Ev. 873, marg. 767, top, (Sharswood's Ed.).

The maxim was, it may be, formerly regarded as more inflexible, and of larger application, than it is now by the current of authority. It is borrowed from the civil law, and was particularly directed to tribunals charged with the determination of matters of fact, and was by them applied according to the facts of the particular case. It is generally admitted, by the courts of common law making the most rigid application of the maxim, that if the witness is corroborated by unexceptionable evidence, the jury are not bound to discredit him. We are prepared to follow the line of authorities which hold the maxim is not a rule of law, operating a disqualification of the witness, to be given in charge to the jury, as imperatively binding them—that it is to be applied by the jury, according to their sound judgment, for the ascertainment, and not for the exclusion of truth.—*State v. Williams*, 2 Jones (Law), 257; *Parsons v. Huff*, 41 Me. 410; *Knowles v. The People*, 15 Mich. 408; *Fisher v. The People*, *Ib.* 135; *Mead v. McGraw*, 19 Ohio St. 55; *Shellabarger v. Nafus*, 15 Kansas, 547; *Blanchard v. Pratt*, 37 Ill. 243; *Calloman v. Shaw*, 24 Iowa, 441; *Mercer v. Wright*, 3 Wisc. 568; *Wilkins v. Earle*, 44 N. Y. 182; *Moore v. Jones*, 13 Ala. 296; 1 Whart. Ev. § 412.

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There are so many considerations, affecting the credibility of a witness, that it is far better, and more promotive of the ends of justice, to leave the jury free in each case to determine, in view of all the evidence, the witnesses whom they will credit, or the parts of the evidence of any witness which they will credit, and which they will discredit than to fetter their judgment by inflexible rules, which may compel them to conclusions they would not otherwise reach. Against the credibility of any witness, it is a strong circumstance, weighing heavily, that he is ascertained to have sworn falsely in regard to some material fact. Yet the jury may find a reason, or motive, for his falsity in that particular, which would not operate upon him as to other facts. "It is said, for instance, to be as much a point of honor for an adulterer to shield his paramour under oath, as it is to shield her in conversation." The several instructions to which we have referred, were properly refused.

2. The remaining instructions were properly refused. Setting fire to the store-house, with the intent that the fire should be communicated to, and burn the dwelling-house, is, in law, deemed the burning of the latter.—1 Bish. Crim. Law, § 318; *Gage v. Shelton*, 3 Rich. (Law) 242.

We find no error in the record, and the judgment must be affirmed.

McNeezer v. The State.

Indictment for Murder.

1. *Confessions; when voluntary and admissible.*—Where the deceased was killed by being cut with a knife, during a sudden quarrel and fight between him and the defendant; and a witness for the prosecution stated that, a short time after the difficulty, the defendant came up while witness was standing with one W. and another person, and being asked by W. "what he had done to Charlie" (meaning the deceased), said that he "had knocked him down with a stick"; that, on W. saying "he had done more than that," the defendant started off, but was pursued and overtaken by W., who thereupon arrested him, and left him in charge of witness and the man who was standing with him; and that while thus in their custody, no threats or promises being made by any one, the defendant said, "I have done what I never wanted to do, or intended to do: I cut Charlie's throat before he drew his knife"; held, that the confession was voluntary and admissible.

2. *Manslaughter; self-defense.*—The charges of the court to the jury in this case, as to the constituents of manslaughter in the first and second degrees, the deceased having been killed by the defendant with a knife, in a mutual fight growing out of a sudden quarrel, and the refusal of a charge asked as to

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the right of self-defense, held free from error, under the former decisions of this court, and other authorities cited.

FROM the Circuit Court of Russell.

Tried before the Hon. WM. S. MUDD.

The indictment in this case charged the defendant, Marion McNeezer, with the murder of Charles Young, by cutting him with a knife; and on the trial, issue being joined on the plea of not guilty, he was convicted of manslaughter in the first degree, and sentenced to imprisonment in the penitentiary for the term of ten years. The following bill of exceptions, which shows all the points here presented for revision, was duly reserved on the trial:

“The State introduced Doctor Norwood as a witness, and established by him that the deceased came to his death by a stab in the throat, in Russell county, on or about the 18th September, 1879. Jim Peck, a witness for the State, swore that, on the morning of the killing, the defendant came to where he and another hand and Mr. Williams were standing; and the State proposed to introduce the declarations of the defendant, made at that time. Thereupon, the court, for its own ear, proceeded to examine said witness, to ascertain the circumstances under which said confession was made. The witness stated to the court, that when defendant came up, Mr. Williams said, ‘*What have you done to Charlie?*’ meaning the deceased; and defendant answered, ‘*I knocked him down with a stick.*’ Williams said: ‘*No, you have done more than that.*’ Defendant started off, and got about one hundred yards, when Williams pursued and overtook him, witness being at that time about forty or fifty yards off. Witness heard Williams say to defendant, ‘*I arrest you, and will leave you in charge of these men,*’ meaning witness and the other hand above referred to, ‘*until I come back.*’ When this was said, witness was still some distance in the rear of defendant and Williams. Witness stated, also, that he heard no threats or promises made, or inducements offered to the defendant by any body; thinks it was all that was said; that he heard all that was said, and the above is all that was said; that he and the other negro came up, and Williams left the defendant in their custody, and during the absence of Williams the confessions occurred which the State proposed to introduce. This was all the preliminary proof as to the admissibility of the confessions; and the defendant thereupon objected to proof being made of any confessions, because no sufficient predicate had been laid for the introduction of such proof, and because it was not shown that any such confessions were voluntary; but the court overruled the objection, and per-

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mitted the witness to testify to the jury as to what was then said by the defendant, and the defendant excepted. Under this ruling of the court, the witness then proceeded to state, that the defendant, when Williams left, lay on the ground on his face, and said, '*I have done what I never wanted to do, or intended to do: I cut Charlie's throat before he drew his knife,*' Witness said, that defendant talked a good deal, both lying down, and standing up, but witness could recollect nothing more that he said; could not recollect whether he laid down once or five times, or any thing more that was said.

"Mr. Martin, then introduced as a witness for the State, testified, that he arrived at where Jim Peck and the other witness had defendant under guard; that defendant was talking when he got there, and said, that he cut deceased before he opened his knife—that he was joking deceased in a pleasant manner about a half-dollar, and had no idea that deceased was mad, when they got into a quarrel, and commenced fighting; that they hitched, and fought all around, and deceased was drawing his knife, when he (defendant) cut him, and then broke loose from him, and ran away. Defendant said more, but witness paid but little attention, and did not remember it. It was in proof, also, that the ground around where the *defendant* (?) was lying was much trampled, and bore evidence of a severe struggle for ten feet around. Two persons got to the deceased before he died; one, Mr. Martin, did not notice him; the other, defendant's father, found a knife tightly grasped in his right hand, open. This was about sun-rise. The fight occurred between daybreak and sun-rise. Doctor Norwood, being recalled, testified as to seeing the knife in the hand of the deceased. There was proof showing that the deceased and the defendant had always been on very friendly terms, visited each other very often, stayed together the night before, and had started off together, a few minutes before the difficulty occurred, in the most friendly manner. There was proof, also, showing that the defendant's coat was cut with a knife, just below the left arm; which cut was discovered a few hours after the killing. There was, also, proof tending to show that defendant was preparing to leave the country.

"This was all the evidence in the case; and the court thereupon charged the jury, that if they believed that, in Russell county, and twelve months before the finding of the indictment, the deceased and the defendant being friendly, just before the killing, defendant began to joke the deceased about a half-dollar, and they got into a quarrel, and then into a fight, and both had drawn their knives, and defendant

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cut and killed the deceased, then the defendant can not be guiltless."

"The court further charged the jury, that if they believed the deceased and the defendant had always been friendly, and got into a quarrel first, joking about a half-dollar, and afterwards into a fight; and the blood of both being heated, both drew their knives, and in the heat of passion, and during the conflict, defendant intentionally cut and killed the deceased; under this state of facts, the defendant is guilty of manslaughter in the first degree.

"The court further charged the jury, that if the defendant unlawfully and intentionally cut the deceased, and killed him, but did not intend to kill him, then the question of manslaughter in the second degree can not arise."

The defendant excepted to each of these charges, and then requested the court to instruct the jury as follows: "If the circumstances were such as to induce the defendant to believe that the deceased was about to attack him with a knife he was then drawing, with the intention and ability to kill him, and, being impressed with the *fact* (?) that his life was in imminent peril, he struck a single blow with his knife, which killed the deceased; then he would not be guilty, even if in fact defendant was not in such peril." The court refused to give this charge, and the defendant excepted to its refusal.

No counsel appeared in this court for the defendant, so far as the record and dockets show; and there is no brief on file.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—We find no error in this record. It was shown that the prisoner's confessions were voluntarily made, and that neither threats nor promises were made to him, to induce him to confess. The case is brought strictly within the rule.—1 Brick. Dig. 509, §§ 859, 864, 868. The charges given were strictly in accordance with the well-settled rules of law.—1 Bish. Cr. Law, 6th ed., sections 869, 870; *McManus v. The State*, 36 Ala. 285; *Cates v. The State*, 50 Ala. 166; *Lewis v. The State*, 51 Ala. 1; *Eiland v. The State*, 52 Ala. 322; *Evans v. The State*, 44 Miss. 762; *Hill's case*, 4 Dev. & Bat. 491. In *Vaiden v. Com.*, 12 Grat. 717-730, the court said, "A man shall not, in any case, justify the killing of another by a pretense of necessity, unless he were without fault in bringing that necessity upon himself."

The record contains no testimony tending in the slightest degree to show that the deceased was about to attack the ac-

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cused with a knife. They were engaged in a conflict, which appears to have been mutually entered upon. For the error above, if for no other, the charge was rightly refused. 1 Brick. Dig. 338, § 41.

The judgment of the court below is affirmed.

Armor v. The State.

Indictment for Murder.

1. *Conduct and declarations of defendant; when admissible against him.*—The conduct and declarations of the defendants on the evening of the homicide, from the time they came to the house where the deceased was living with her son-in-law, until the commission of the crime, are admissible evidence against them, when parts of one continuous transaction, although occurring between the defendants and the son-in-law, in the absence of the deceased, and outside the house where she was, and not shown to have any immediate connection with the crime.

2. *Drunkenness as defense; to what witness may testify.*—Whether the defendant, at the time of the homicide, was so drunk as to be incapable of forming a design or intent, is a conclusion to be drawn by the jury from all the evidence before them, and not a question of fact to which a witness may testify.

3. *Proof of character; weight and effect as evidence.*—In all criminal prosecutions, whether of felony or misdemeanor, the accused may prove his good character, not only when a doubt exists on the other proof, but even to generate a doubt of his guilt; but its value varies according to the proof to which it is opposed, and in connection with which it must be weighed and estimated by the jury; and it does not shield from the consequences of a criminal act, proved to the satisfaction of the jury, though it may raise a reasonable doubt of the act having been done with a criminal intent.

FROM the Circuit Court of Russell.

Tried before the Hon. JAMES E. COBB.

The indictment in this case was found in October, 1879, and charged that the defendants, Scott Armor and Ivey Doles, "unlawfully and with malice aforethought killed Susan Calhoun, by cutting her with a knife." The defendants each pleaded not guilty, and were jointly tried. The jury acquitted Doles, but found Armor guilty of murder in the second degree, and fixed his punishment at imprisonment in the penitentiary for the term of ten years. The case is brought to this court by Armor, on a bill of exceptions reserved by him during the trial, as follows:

"The State introduced General Miles as a witness, who testified, that on the second Saturday night in June last the defendants came to his house, where the deceased lived, a short time after dark; that he heard them coming, hollering and whooping, before they got there; that they came into

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his yard, near the fence, and his dog ran out and barked at them; that they came into his house, and Doles came in and saw Susan Calhoun, the deceased, and said, 'there was his old friend that drank whiskey with him last Christmas,' and asked her to take a drink with him, which she did; that he then asked witness to take a drink with him, and witness did so; that they then left the house, it being about 8 o'clock at night; that the night was dark, and the rain drizzling; that witness, his children, and the deceased, who was his wife's mother, and lived with him, were at home that night; that the defendants returned, a short time afterwards, to the yard fence, and called 'Hallo' twice; and that he went out from the house, near which they were. The State then offered to prove, by said witness, that said Armor told him to come out there near the fence, 'that he intended to give him hell;' that witness told them he had no business out there, and would not go, and started back to his house, and had gone about eight or ten steps, and got around the house, when said Doles ran up behind him, and put both arms around him, so that he could not raise either of his arms; that he asked them what was the matter, and what they meant; that Doles told Armor, 'Take him up, and let's carry him out,' and caught witness under the leg, while Armor caught him by the pantaloons down at the foot; that his pantaloons slipped up to his knee, and he straightened out his leg, and tripped up Armor, who fell on the ground: that he saw Armor drawing his knife as he got up, and called out to Doles to let him loose, 'that man' (said Armor) 'was going to cut him;' that Doles said no, he would not; that he and Doles turned around once or twice; that Armor got up, and made several licks with his knife, witness avoiding the blows, and cut him on the head severely; that he then got loose from Doles, and ran off, and went over to Mr. Chappell's, and had his wound hastily dressed, and returned; that the deceased was in the house when he left, the door being opened, and when he returned, in about a half-hour, or three-quarters, he found her dead on the floor, with a wound in the neck made by a knife, or by some other sharp instrument; and that he never saw any person cut the deceased. The defendant Armor objected to all that portion of the testimony of said witness which showed what Armor said to him, and what Doles and Armor did to him, in the absence of the deceased; also, to that portion of said evidence which showed that Armor cut the witness; and to all that portion which showed that there was a difficulty between said Doles and Armor and the witness in the absence of the deceased, and to each part thereof separately." The grounds of objection to this evidence, as

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specified, were, "because it was illegal;" "because it was irrelevant;" "because it was no part of the *res gestæ*;" "because it was a separate and different transaction from that of the killing;" "because there was no connection between this difficulty and the killing of the deceased." The court overruled each of these objections, and allowed the witness to testify to the facts as stated; and the defendant duly excepted.

"The State then introduced one Pitts as a witness, and offered to prove by him that the deceased was sixty or seventy years old;" to which evidence the defendant objected, on the ground that it was illegal and irrelevant, and excepted to the overruling of his objection. "There was evidence tending to show that, after the witness Miles had left, the defendants entered the house where the deceased was, and that said Armor cut by stabbing her in the neck, and that she died from the cut; also, that this was in Russell county, in June last; and that she was a woman of bad and turbulent, and dangerous character; and that said Armor is a man of good general character, and has been possessed of such good character for the last twenty years, in the neighborhood in which he has lived; and that the witness Miles was a man of very bad general character, and unworthy of credit in a court of justice. The defendants then offered to prove, by C. O. Brunson, that they left Hatchechubbie about dark on the evening of the killing; and that they were intoxicated, and so much under the influence of liquor as hardly to be able to exercise locomotion, or to talk intelligibly or intelligently, and so much so as to render them incapable of forming a design or intent." On objection by the State, the court ruled out the italicized portion of this evidence; and the defendant excepted to its rejection. "The defendant then moved the court to exclude from the jury all that portion of the evidence of the witness Miles before objected to, and on the same grounds then specified;" which motion the court overruled, and the defendant excepted.

"The court charged the jury in writing, at the request of the defendant Armor, and, among other things, charged as follows: 'No man is less amenable than another to the penalties of the law, if its commands are disregarded. All, whether of good or bad character, are liable to punishment, and should receive punishment, when they violate the laws of the land. Proof of good character, then, is not permitted to go to the jury for the purpose of shielding the defendants from the consequences of their conduct, but simply as a circumstance to be considered by the jury, along with the other evidence in the case; and if, from all the evidence, you believe the defend-

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ants, or either of them, to be guilty, you should so say by your verdict, as firmly against a man of good character as of bad." To the italicized portion of this charge the defendant Armor duly excepted.

W. D. ROBERTS and W. D. WOOD, for the defendants.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—All the occurrences of the evening, from the time Doles and Armor first came to the house of Miles, until the killing of the deceased, including their several declarations, were but parts of a continuous transaction, and there was no error in permitting the State to prove them.

2. Whether, immediately before, and at the time of the homicide, the intoxication of the appellant was so great as to render him incapable of forming a design, or intent, was a conclusion to be drawn by the jury from the facts before them; in reference to which, a witness could not aid them by the expression of an opinion.—*Gassenheimer v. State*, 52 Ala. 313; *Johnson v. State*, 17 Ala. 618.

3. It is now too well settled, by numerous decisions of this court, to be controverted, that in all criminal prosecutions, whether of felony or misdemeanor, the accused may prove his good character, not only when a doubt exists on the other proof, but even to generate a doubt of his guilt.—*Felix v. State*, 18 Ala. 720; *Harrison v. State*, 37 Ala. 154; *Dupree v. State*, 33 Ala. 380; *Hall v. State*, 40 Ala. 698. There may be cases, in which the evidence against the accused would satisfy the jury of guilt, if his character was unknown; but, that shown to be good, and that he had never indicated the particular wicked traits involved in the crime charged, would, perhaps, produce a reasonable doubt of guilt in the minds of the jury. So, there may be cases, in which the evidence of guilt is so clear and convincing, that no evidence of character can weaken its force. Character is a fact fit to be proved on behalf of the accused, on every criminal accusation; but its value, intrinsic or relative, will vary according to the proof to which it is opposed, and in connection with which it must be weighed and estimated by the jury. It does not shield from the consequences of a criminal act, proved to the satisfaction of the jury; though it may raise a reasonable doubt of the act having been done with the criminal intent.

We find no error in the instructions to the jury, to which exceptions were taken, nor in the other rulings of the court.

The judgment is affirmed.

[Powell v. The State.]

Powell v. The State.

Indictment against Retailer of Spirituous Liquors.

1. *Selling liquor "drunk on or about premises."*—*Held*, on the authority of *Pearce v. The State* (40 Ala. 720), that the defendant was properly convicted of selling liquor "drunk on or about his premises" (Code, § 4204), on proof that the liquor was sold from a jug which he had, in a field where he was working with others, more than a mile from his house, and in the plantation of another person, over which he had no control.

FROM the Circuit Court of Wilcox.

Tried before the Hon. JOHN K. HENRY.

The indictment in this case was found in May, 1879, and charged that the defendant, "not having first procured a license as a retailer from a proper legal authority, did sell vinous or spirituous liquors, which was drunk on or about the premises." The defendant pleaded not guilty, and issue was joined on that plea. The case is brought to this court on a bill of exceptions, reserved on the trial by the defendant, as follows: "The State introduced one Lewis Orange as a witness, who testified that, in February, 1879, in said county, he bought a ten-cent drink of whiskey from the defendant, on a ditch in the plantation of John C. Pritchett; that the place was more than a mile from the defendant's house; and that said defendant, at the time of said sale, was engaged in digging said ditch with witness and others. The State then introduced one Andrew McMahon as a witness, who testified that, in the month of February, 1879, in said county, he bought a pint of whiskey from the defendant, on a ditch in the plantation of John C. Pritchett, which was at the same time and place testified about by said Lewis Orange. Said witness testified, on cross-examination, that defendant told him, when asking for some whiskey, that he had some in a jug there which he would sell, and he told witness and others that he had brought the whiskey there to sell. Each of said witnesses testified, that they drank the whiskey right where they bought it, and in the presence of the defendant. There was no other evidence in the case, as to the place at which the whiskey was sold, or as to the defendant having control of the place where it was sold. This was all the evidence in the case, the defendant offering none; and the defendant's counsel admitted that he had no defense, except that he contended the evidence failed to show that the liquor was drank

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on or about his premises. On this evidence, the court charged the jury, at the instance and request of the solicitor, that, if they believed the evidence, it is their duty to convict the defendant. The defendant excepted to this charge, and requested the court, in writing, to instruct the jury, that if, from the evidence, they find that the defendant sold the whiskey, in a quantity less than a quart, on the plantation of John C. Pritchett, over which the defendant had no control, and more than one mile from the defendant's residence, then they must acquit the defendant. The court refused to give this charge, and the defendant excepted to its refusal." The jury returned a verdict of guilty, and imposed a fine of one hundred dollars; and the fine and costs not being paid presently, nor judgment confessed for the amount, the court sentenced him to perform hard labor for the county for thirty days, and to an additional term of fourteen hundred and two days, "for the costs and officers' fees, amounting to \$268.30."

J. N. MILLER, for the defendant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—We feel constrained to affirm the judgment in this case, on the authority of *Pearce v. The State*, 40 Ala. 720, from which we do not feel at liberty to depart. The sentence is heavy, if not oppressive, owing to the very large bill of costs taxed, for which it is difficult to account on any theory, other than that there must have been an unusual number of witnesses for so small a case. We suggest that, in our opinion, this is a case for executive clemency, at least, for a part of the punishment ordered.

The judgment is affirmed.

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Indictment for Murder.

1. *Threats against deceased by third person.*—On a trial under an indictment for murder, the evidence against the accused as the slayer being entirely circumstantial (except some "alleged confessions"), he can not be allowed to prove threats made against the deceased by a third person, who had had a personal difficulty with the deceased a few months prior to the homicide, and who was shown to have evaded the service of subpoena as a witness on the inquest.

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FROM the Circuit Court of Sumter.

Tried before the Hon. WM. S. MUDD.

The prisoner in this case was indicted in October, 1879, for the murder of John W. Pierce in 1868. He pleaded not guilty to the indictment, and was tried on that plea; was found guilty of murder in the first degree, and sentenced to the penitentiary for life. On his trial, he reserved a bill of exceptions, on which the case is brought to this court, and which is as follows: "The State introduced evidence tending to show that the deceased, while on his way to the field, carrying breakfast to the hands there at work, was slain by two persons, lying in ambush, and shooting him from two different points. The killing was done in Sumter county, in 1868, and was witnessed by no one. There was no proof that anyone witnessed it. There was no evidence connecting the defendant with the homicide, except circumstantial evidence, and alleged confessions of the defendant. There was no ill-feeling against the deceased, or other motive on the part of the defendant for killing him, introduced in evidence. The defendant proved, without objection, that the deceased and one McClean, both of whom resided in the same neighborhood when the homicide was committed, about four months prior to the killing had a personal difficulty, in which the deceased shot said McClean in the mouth, from which he was confined in his house about a month; and that the ill-feeling between them, created by the difficulty, was not healed up to the time of Pierce's death. The proof tended to show, also, that said McClean, when the inquest was held on the body of Pierce, evaded process of subpoena by the coroner, and did not appear at the inquisition. The defendant then offered to prove that said McClean, during his confinement from his said wound, and repeatedly after he was able to get about, declared his purpose to kill the deceased. To the admission of these declarations as evidence the State objected, and the court sustained the objection; to which ruling the defendant excepted."

A. W. COCKRELL, for the defendant.—The absence of all evidence pointing to another as the guilty agent, is a circumstance to be weighed and considered by the jury in determining whether the accused committed the homicide.—*Hall v. The State*, 40 Ala. 707. The material issue was, whether the accused committed the homicide; and any evidence legitimately tending to show that it was committed by another person, was relevant to that issue. There was no witness to the assassination. Suppose it was in fact committed by another person; how could the accused establish the fact, ex-

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cept by proof of a former difficulty, ill-feelings, threats, &c., which would make out the case against that person, if on trial?

H. C. TOMPKINS, Attorney-General, for the State, cited *Smith v. The State*, 9 Ala. 990; *Levison v. The State*, 54 Ala. 527; *Hudson v. The State*, 61 Ala. 333; *Commonwealth v. Chabcock*, 1 Mass. 143; *State v. May*, 4 Dev. Law, 328.

BRICKELL, C. J.—After a careful examination of the record, we find the indictment sufficient, and the proceedings were in all respects conducted in strict conformity to the modes prescribed by law. The question presented by the bill of exceptions is the only matter to which our attention has been directed by counsel; and that must be regarded as settled adversely to the prisoner.—*Smith v. The State*, 9 Ala. 990; *Levison v. State*, 54 Ala. 527; *Hudson v. State*, 61 Ala. 333. A very large latitude was allowed the prisoner, in receiving evidence of the motive of another to commit the crime with which he was charged, and of his evasion of justice. Threats of such person to take the life of the deceased were, at best, hearsay only, and too remote from the inquiry before the jury to have been received.

We find no error in the record, and the judgment must be affirmed.

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Indictment for Murder.

1. *Service of copy of indictment on prisoner; variance.*—When the defendant is charged with a capital offense, and is in actual confinement, the statute requires that he be served with a copy of the indictment, and of the list of jurors summoned for his trial (Code, § 4872); and if there is a material variance between the original indictment and the paper served as a copy, in the name of the deceased—as, *Luke Hudnett* instead of *Luke Hodnett*—this is not a compliance with the statute, and the defendant should not be ruled to trial.

2. *Verdict of guilty of less offense than charged.*—A verdict finding the defendant guilty of murder in the second degree, under an indictment for murder, operates as an acquittal of the higher offense; and on a second trial, after a reversal of the judgment, he can not be convicted of murder in the first degree.

3. *Murder in second degree.*—Murder in the second degree may be committed without an intention to take life. Mere words, no matter how insulting, never reduce a homicide to manslaughter. If one strike another, not in self-defense, with intent to maim him, and death ensue; or, if one kill another without intending it, in the attempt to commit a felony; in either case, he is guilty of murder in the second degree.

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FROM the Circuit Court of Randolph.

Tried before the Hon. JOHN HENDERSON.

The prisoner in this case was indicted for the murder of Luke Hodnett, by striking him with a gun. On being arraigned, he pleaded not guilty, and a day was set for his trial; and he being in actual confinement, never having been admitted to bail, the court entered an order, directing the sheriff to "serve the defendant, in person, with a copy of the indictment, and a list of the jury to try this cause, one entire day before the day set for trial." When the cause was called for trial, on the day appointed, the defendant objected to going to trial, on the ground that this order of the court had not been complied with, inasmuch as, in the copy-indictment served on him, the name of the deceased was spelled Luke *Hadnett*, instead of *Hodnett*, as in the original indictment. The two papers being submitted to the inspection of the court, the State proposed to ask the clerk of the court what the name in the copy was; to which he answered, "that the word was intended for *Hodnett*, but that it looked more like *Hadnett*." To this evidence, both to the question and to the answer, the defendant objected, on the ground "that the copy must speak for itself, and that parol evidence was not admissible to prove what any particular word therein was." The court overruled the objection to the evidence, and required the defendant to proceed to trial; to which rulings, each, he duly excepted. The original indictment and the copy are sent to this court for inspection, under the certificate of the presiding judge, according to the rule of practice in such cases prescribed.

The bill of exceptions purports to set out all the evidence introduced on the trial, but it is not necessary to state it all at length. Only two witnesses were introduced to prove the circumstances immediately attending the homicide. Henry Hughley, one of these witnesses, thus testified: "Witness was with defendant on the morning of the difficulty, in the town of Wedowee, and went with him from the town to where Luke Hodnett was splitting rails, about a mile distant. When they got to where Luke Hodnett was splitting rails, defendant said to Hodnett, 'I have had a calculation made, and have come to have a settlement with you'; to which Hodnett replied, 'I have no money, and you will have to wait until I can get some before I can pay you.' Defendant replied: 'No, I intend to have what you owe me now.' Hodnett replied: 'I would suffer my right arm cut off, before I would fight as old a man as you are'; and defendant replied, 'I don't want to fight.' When defendant said this, Hodnett, who had been busily engaged splitting rails during the whole

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conversation, and was standing with his back to defendant, immediately stooped, and placed his wedge in the rail-cut; and while rising, half bent, defendant struck him over the head with a gun while his back was to defendant, and then stepped back a few steps and struck him again with the gun, and started to strike a third time, when witness interfered and prevented him from doing so. Witness further testified, that there was no quarrel between the defendant and Hodnett, and that what is above set out was all that was said or done by them;" and his testimony on cross-examination was substantially the same. Washington Hodnett, the other witness for the State, thus testified: "Witness was present at the time of the difficulty between the defendant and Luke Hodnett, which occurred about 11 o'clock in the morning, in December, 1879, but he did not remember the day of the month. Witness was present when defendant and said Hughley came to where Luke Hodnett was splitting rails, and heard the conversation between them, and saw the difficulty. After some conversation between defendant and Luke Hodnett, they became engaged in a quarrel, in relation to a matter of indebtedness between them. Witness heard defendant say to said Hodnett, 'Do you make me out a liar?' and Hodnett replied, 'I'll make you out a liar or any thing else.' At this time they were standing face to face, and very close together; and when Hodnett said this, defendant struck him on the head with a gun two or three times, and then stamped him. Defendant then left the place of the difficulty, and witness left Luke Hodnett lying on the ground there; and he remained on the spot where he was knocked down by defendant, until witness went to Mr. Carpenter's, about a half-mile distant, and told what had happened; and witness, with some other persons at Carpenter's house, came back to the spot, and found Hodnett still lying there, and carried him to Carpenter's house, where he died on the evening of the next day." The testimony of this witness on cross-examination was, in several particulars, materially variant from his testimony in chief; but he adhered to his statement as to the conversation between the parties, and that they were standing face to face when the first blow was struck by the defendant. He said that he was about twenty feet distant from the parties, and was standing at the place where Luke Hodnett had been splitting rails; that said Hodnett was moving rails when the defendant came up and sat down on a log, "and remained sitting on the log until said Hodnett called him a liar;" also, that after the difficulty, and after the defendant had left, "said Hodnett and witness left the place together, and went within about one hundred yards

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of Mr. Carpenter's house, when Hodnett stopped to wash his head in a branch, and told him to go to Wedowee after a doctor;" that he did as requested, stopped at Carpenter's house on his return, and then came with others to the branch where he had left Hodnett, and they carried him to Carpenter's house. Another witness for the State testified, "that he was present, on the morning before the difficulty, when defendant had a calculation made, showing the indebtedness of Luke Hodnett to him; that defendant told the person who made the calculation that he wanted to sue Hodnett for the amount; that said person informed him that Hodnett was insolvent, and a suit against him would be useless; and that defendant then said, 'I'll go and see him, and show him the calculation, and if he don't pay me, he will have to settle with a doctor.'" It was proved, also, that Hodnett's skull was fractured by the blows he had received, and that he died on the next day from the effects of it.

The defendant requested ten charges to the jury, which were in writing, and which were refused by the court; exceptions being reserved to their refusal. Among these charges were the following:

"6. If the jury believe from the evidence that the defendant did not intend to take the life of Hodnett, but merely intended to beat him, the fact that said Hodnett died from the effect of the wound inflicted by the defendant does not show that the killing was with malice.

"7. If the jury believe from the evidence that, in point of fact, the defendant did not intend to kill said Hodnett, such want of intention to take life overturns any presumption of malice arising from previous threats made by defendant against Hodnett.

"8. The necessity that will justify the taking of life need not be actual, but the circumstances must be such as to impress the mind of the slayer with the reasonable belief that such necessity is impending.

"9. If the jury believe from the evidence that the defendant, at the time of striking Hodnett, had reasonable ground to believe that said Hodnett was about to strike him with an iron wedge, then defendant had a right to strike in self-defense, if he had reasonable grounds to believe that it was necessary to strike, in order to save himself from impending death, or great bodily harm.

"10. If the jury believe from the evidence that Hodnett, by giving defendant the lie, provoked the defendant to strike him, and the defendant unfortunately killed him, by beating him in such a manner as showed only an intent to chastise,

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and not to kill him ; the law so far considers the provocation of contumelious behavior, as to adjudge it only manslaughter, and not murder."

SMITH & SMITH, for the defendant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—In trials for capital offenses, the statute requires that the defendant, if in actual confinement, shall be served with a copy of the indictment, and of the list of jurors summoned for his trial, at least one entire day before the day appointed for his trial.—Code of 1876, § 4872. The rule of service is different, when he is not in actual confinement. The reason of this statute is, that the accused may be informed of the charge against him, so that he may prepare for his defense. The indictment charges the murder of Luke Hodnett. The paper served as a copy describes the slain as Luke Hadnett. The names are clearly not *idem sonans* ; and it follows, that a literal copy of the indictment was not, in fact, served on the defendant.—Whar. Amer. Cr. Law, § 596 ; *Sayres v. The State*, 30 Ala. 15 ; *Page v. The State*, 61 Ala. 16. The variance in the present case may appear slight, and possibly it may be assumed the accused was not misled by it. Still, it is a variance. A copy of the indictment was not served. If we were to disallow this objection, on the ground that the variance did not mislead, we enter upon an uncertain field of probabilities, and know not where we would find a limit. Better to err in favor of life and liberty, than to enter upon ground so dangerous. The statute guarantees to persons so charged the right to have a copy of the indictment upon which they are to be tried, and it is not for us to say anything less than a copy meets this requirement. The Circuit Court erred in ruling the defendant to trial.

2. We need not consider the charges bearing on the question of murder in the first degree. The jury acquitted the defendant of the highest grade of homicide, and found him guilty of murder in the second degree. He can not be again put on trial for a higher offense than that of which he was convicted—murder in the second degree.—*Bell & Murray v. The State*, 48 Ala. 684. So, whether the court's rulings on the crime of murder in the first degree were right or wrong, is immaterial in the further trial of this cause.

3. Murder in the second degree may be committed without an intention to take life. Mere words, no matter how insulting, never reduce a homicide to manslaughter. So, if

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one strike another, not in self-defense, with intent to maim him, and death ensue; or, if one, in the attempt to commit a felony, kill another without intending it; in either case, he is guilty of murder in the second degree. Charges 6, 7 and 10 were rightly refused. In *Judge v. The State*, 58 Ala. 406, and *Mitchell v. The State*, 60 Ala. 26, we discussed these questions so fully, that we consider further comment on these charges unnecessary. Charges 8 and 9 we consider abstract, and they were rightly refused on that account, if on no other.

Reversed and remanded. Let the accused remain in custody, until discharged by due course of law.

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Indictment for Betting at Pool Table.

1. *Betting at licensed table.*—To authorize a conviction for betting at a table regularly licensed (Code, § 4210), it must be proved that the defendant bet money, bank-notes, or something else of value, other than the charge for the use of the table, and that the table was regularly licensed. The statement of a witness that the defendant “bet” at the table, without more, is not sufficient proof of the first fact; and if it appears that the table was under the control of a person who had not taken out a license, but had procured the transfer of a license from the former proprietor, such license not being transferrable, the prosecution fails also as to the second fact necessary to be proved.

FROM the County Court of Madison.

Tried before the Hon. WILLIAM RICHARDSON.

This case originated in the Circuit Court, where the indictment was found, and was transferred to the County Court, as a cause undisposed of at the end of the term, under the provisions of the act to regulate the trial of misdemeanors in said county, approved February 9, 1877.—Sess. Acts 1876-7, p. 149. The indictment charged, that the defendant “bet at a game of pool, at a table regularly licensed.” The defendant pleaded not guilty, and waived a jury; and the cause was heard and decided by the judge alone. On the trial, as the bill of exceptions states, the State introduced a witness, who testified, “that he saw the defendant bet at a game of pool, which was played on a table at the ‘Huntsville Hotel,’ in Huntsville, Madison county, Alabama, in the month of October, 1877, which was within twelve months before the finding of the indictment; and that said hotel, with the billiard and pool tables, was in the possession and control of one

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Jackson. No other proof was offered, as to the act of betting; no evidence showing, or tending to show, what defendant had bet, or its value, if any, or with whom, if with any body, said bet was made." The State then proved the issue of a license to keep a table for playing pool, during the year 1877, to one A. B. Moore, who was the lessee of said hotel for the year 1877, but abandoned his lease about the 1st of August, or September, and transferred his license for the table, in consideration of the payment of \$25, to said Jackson; "that said Moore, after he abandoned said hotel, did not return, and that Jackson did not, so far as witness knew, take out any other license. No evidence was introduced by the State showing that any license, other than that so taken out by said Moore, was ever taken out for said table." On this evidence, the court adjudged the defendant guilty, and imposed a fine of \$50 on him, besides costs; to which ruling and judgment the defendant duly excepted.

BRICKELL, C. J.—The indictment could be supported only by proof of two facts, the existence of one of which the evidence negatives, and as to the other it is wholly insufficient. The first of these facts is, that the defendant *bet*, or *hazarded*, money, bank-notes, or other thing of value, at a game of pool, other than the charge for the use of the table. The statement of a witness, that he *bet* at such game, if it could be supposed to include the risking or hazarding of money, or bank-notes, or a thing of value, does not negative that it was not the charge for the use of the table. The other fact is, that the table was regularly licensed. So long as the table was under the control of Moore, to whom license for keeping it had issued, it was within the words of the indictment, pursuing the statute, "*regularly licensed*." But, when Moore ceased to keep it, transferring the control of it to Jackson, the license expired. The revenue law expressly declares, that it is not transferrable.—Code of 1876, § 491; Acts of 1875-6, § 1, p. 78.

The judge of the County Court erred, in adjudging the appellant guilty, and sentencing him to pay a fine and costs. Let the judgment be reversed, and the cause remanded. The appellant must remain in custody, until discharged by due course of law.

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Ex parte Brown.

Petition for Habeas Corpus.

1. *Appellate jurisdiction on habeas corpus.*—When application is made to this court for the writ of *habeas corpus*, after relief has been refused by an inferior court or magistrate, to whom a proper application was made, the jurisdiction of this court is revisory and appellate only; hence, it can not receive or consider evidence which was not before the primary court or judge:

2. *Criminal jurisdiction of justice of the peace in Jackson county.*—The General Assembly, in the exercise of its constitutional powers, having conferred upon justices of the peace in Jackson county, and in certain other counties specially named, "original jurisdiction, concurrent with the Circuit Court, of all misdemeanors committed in said counties respectively" (Sess Acts 1876-7, p 197), this grant of jurisdiction carries with it, by implication, every thing necessary to render it effectual; and in the exercise of this jurisdiction, a justice of the peace may render the same judgment that might be rendered by the Circuit Court, and, on conviction of the defendant, may impose the same sentence and punishment that might be imposed by either the court or the jury.

3. *Relief on habeas corpus.*—To authorize a discharge from custody on *habeas corpus*, when the applicant or prisoner is held under the order of a court or magistrate, a want or excess of jurisdiction, and not a mere irregularity in the exercise of jurisdiction, must be shown.

APPLICATION by petition for the writ of *habeas corpus*, to procure the discharge of Samuel Brown from custody and imprisonment by the jailor of Jackson county, under a *mittimus*, or order of commitment, issued and signed by W. L. Kirkpatrick, a justice of the peace of said county. The petition to this court alleged, that the prisoner was wrongfully held in custody, "because said justice of the peace exceeded his jurisdiction as to matter, and his sentence is not in accordance with law, being in excess of what said justice could render;" and a copy of the judgment and sentence of the justice, with the order of commitment and the original affidavit and warrant of arrest, were made exhibits to the petition. The petition further alleged that application was made to this court for relief, because a proper application had been previously made to Hon. NELSON KYLE, the judge of probate of said county, and had been by him refused; and a copy of his decision in the matter, giving his reasons for refusing to discharge the prisoner, was also made an exhibit to the petition. In the warrant of arrest, and in the affidavit on which it was issued, as those papers show, the offense charged against the prisoner was "an assault and battery with a knife with intent to murder," alleged to have

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been committed on one A. J. Pace ; while the judgment and sentence of the justice was, that the defendant was "guilty to the extent of an assault and battery, and sentenced to one year's hard labor for the use of the county." In the order of commitment, however, it was stated that the accused "was charged with an assault and battery with a knife upon the person of A. J. Pace, and was tried and convicted, and sentenced to one year's hard labor for the use of said county;" and the judgment of the probate judge recites, that the *mitimus* was the only evidence introduced before him.

L. C. COULSON, for the petitioner.

BRICKELL, C. J.—A prisoner, who, by some court or judge, competent to act in the premises, has, on a proper application, been denied relief on *habeas corpus*, may in this court renew the application. The jurisdiction this court exercises is revisory and appellate—not original ; and facts which were not before the court or judge hearing the application originally, can not be here introduced. We do not look, therefore, into the papers attached to the petition to this court, which were not before the judge of probate.—*Ex parte Croom & May*, 19 Ala. 561.

The constitution confers on the General Assembly the power of dispensing with a grand jury, in prosecutions for misdemeanors, and to authorize such prosecutions before justices of the peace, or such other inferior courts as may be by law established. In the exercise of this power, the General Assembly, by act approved February 8, 1877, clothed justices of the peace, in Jackson and several other counties, with *original jurisdiction, concurrent with the Circuit Court, of all misdemeanors committed in said counties.*—Pamphlet Acts, 1876–7, p. 197. This grant of jurisdiction carries, by implication, every thing which is necessary to render it effectual.—9 Bac. Ab. 219–20. The justice has full jurisdiction to render a judgment of conviction, or of acquittal. If the judgment is of conviction, he can pronounce the same sentence of punishment, which could be pronounced in the Circuit Court, either by the court or the jury. Pronouncing the same, no other, or greater, whatever of irregularity may intervene, there is not a want or excess of jurisdiction, and on *habeas corpus* the prisoner can not be discharged. *Illegality*, not *irregularity*, must infect the proceedings, to authorize a discharge on *habeas corpus*. The prisoner was convicted by the justice of an assault and battery with a knife ; and if the knife was a deadly weapon, and other facts were made apparent, a sentence of hard labor for the county for the

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term of twelve months was authorized by law.—Code of 1876, § 4315.

There was no proper ground for the discharge of the prisoner shown to the probate judge, and he was not in error in refusing it. The application is refused.

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Indictment for Burglary.

1. *Indictment; inquiry into evidence before grand jury.*—When it appears that a competent witness was sworn and examined before the grand jury by whom the indictment was preferred, a motion to quash the indictment, or to strike it from the files, on the ground that it was found on insufficient or illegal evidence, can not be entertained.

2. *Verdict and sentence on conviction of burglary.*—Under an indictment for burglary, and a verdict of guilty as charged in the indictment, not fixing the punishment (Code, §§ 4343, 4450), the court may impose a sentence to confinement in the penitentiary at hard labor for two years.

3. *Impeaching witness by proof of former declarations.*—A witness can not be examined as to his former declarations, about a matter that is collateral and irrelevant for the purpose of laying a predicate to impeach him; and when the matter inquired about is relevant, he can not be required to give a categorical answer, but has the right to explain what he said on the specified occasion.

FROM the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

The indictment in this case was found in November, 1879, and charged that the defendant, Alexander Washington, "with intent to steal, broke into and entered the dwelling-house of Amanda Arnold." Before pleading to the indictment, the defendant moved the court to quash it, or to strike it from the files, on the ground that there was no legal evidence before the grand jury implicating the defendant in the commission of the offense; and in support of this motion, he offered to prove by several of the grand jurors, and by Mrs. Amanda Arnold, the prosecutrix, who was the only witness examined before the grand jury, "that her testimony before the grand jury was to the extent that her house had been broken into and entered, and certain goods stolen from it, but she testified to nothing tending to connect the defendant with the commission of said offense, except what had been told to her by other witnesses, for whom subpoenas were issued, but who were not examined as witnesses before said grand jury." The court refused to receive this testimony,

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and overruled the said motions, and also overruled similar motions, made after all the evidence was adduced on the trial; to which rulings and decisions exceptions were duly reserved by the defendant.

On the trial, Mrs. Amanda Arnold, a witness for the State, testified that, in July, 1879, her dwelling-house was one day broken into and entered during her absence, and three pieces of cloth were stolen from it; that she "got back one of the pieces of cloth, on the day of the burglary, from Melinda McDonald's boy, who brought it to her to make up, as she was sewing for said Melinda; that she did not know the defendant, but saw him in company with Allen Hampton, on the road about a mile from her house, on the day her house was broken into; that she knew of nothing tending to show that the defendant had anything to do with the offense, except from what had been told to her by other persons; that the defendant had never told her anything about it, and she had never heard him say anything to any one about it, except that, on the trial for this offense before the justice of the peace, he said that he had found the cloth that he sold to said Melinda in the road." Melinda McDonald testified, that she bought the piece of cloth from the defendant on the morning the burglary was committed, and that at the time, in reply to questions by her, he said, "I have been peddling, and have sold out all but this, and I will sell it for less than it cost." Allen Hampton testified, "that he saw defendant early in the morning of the day that he heard Mrs. Arnold's house had been robbed; that he saw him, and stopped and talked with him, on the road between Whistler and Mrs. Arnold's house, about a mile from her house; that while he was talking with him, Mrs. Arnold passed them, going towards her house, with a bundle; that he came on, soon after she passed, to the city of Mobile, and did not see defendant again until about a week afterwards, when he met him on the Eight-mile Creek bridge. On the cross-examination of this witness, the defendant's counsel asked him, for the purpose of laying a predicate to impeach him, 'if he did not, on the very day that he saw defendant at said bridge, tell Mrs. Arnold to have defendant arrested for breaking into her house'; to which question the witness was about to reply, by stating what he had told Mrs. Arnold, when defendant's counsel objected, and said that he wanted the witness to answer the question categorically—yes or no. The witness said: 'I do not know how to answer the question, but I can tell you exactly what I did tell Mrs. Arnold.'" The court refused to compel the witness to answer the question categorically, and the defendant excepted; and as the de-

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fendant objected to an answer in any other form, the question was not answered at all.

The jury returned a verdict of "guilty as charged in the indictment." The defendant moved in arrest of judgment, on account of the insufficiency of the verdict, because it did not designate the character of the punishment; but the court overruled the motion, and sentenced him to be confined at hard labor in the penitentiary for the term of two years.

BOYLES, FAITH & CLOUD, for the defendant.—1. By positive constitutional provision (Art. I, §§ 6-8), immunity is secured to the defendant from accusation, arrest or detention, in all criminal prosecutions, except in cases ascertained by law, "and according to the forms which the same has prescribed"; and by statutory provision equally positive (Code, § 4776), a grand jury is forbidden, in the investigation of an indictable offense, to act upon other than legal documentary evidence, or the testimony of witnesses given before them. An investigation by a grand jury is an essential step in the prosecution of an indictable offense, and great inquisitorial powers are confided to that body; but it is not above the law, and can not disregard the settled principles of law; and whenever it assumes to do so, and the fact is brought clearly to the notice of the court charged with the duty of enforcing its presentments, the court will set aside such illegal action. *Sparrenberger v. The State*, 53 Ala. 481; *Low's case*, 4 Greenl. 439; *People v. Baker*, 10 How. Pr. 567; *People v. Hulbut*, 4 Denio, 133; *U. S. v. Reed*, 2 Blatchford, C. C. 435; *U. S. v. Porter*, 2 Cr. C. C. 60; *U. S. v. Charles*, 2 Cr. C. C. 76; 2 Gall. 364.

2. Hampton should have been required to give a direct answer to the question asked him, the object being to impeach him; and afterwards he might have been allowed to explain.—*Payne v. The State*, 60 Ala. 80; *Haley v. The State*, at the present term.

3. The offense of burglary is punishable by two different characters of punishment—imprisonment in the penitentiary, or hard labor for the county, for not less than one year, nor more than twenty years.—Code, § 4343. It therefore does not fall within section 4450, nor any other section giving the court a discretion; and the power not being given to the court, the punishment must be determined by the jury.—*Turner v. The State*, 41 Ala. 21; *Steele v. The State*, 61 Ala. 213. Nor is the punishment imposed by the court prescribed by law. A sentence to hard labor must be for the county; a sentence to the penitentiary must be simply imprisonment, or confinement by the warden, in such manner as the law

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may direct. No law authorizes a sentence to imprisonment in the penitentiary and hard labor.

H. C. TOMPKINS, Attorney-General, for the State, cited *Sparrenberger v. The State*, 53 Ala. 481; 2 Brickell's Digest, 548-9, §§ 117, 125; Code, §§ 4450, 4506.

STONE, J.—In refusing to entertain the motion to strike the indictment from the file and quash it, the City Court ruled in precise accordance with what was said by this court in *Sparrenberger's case*, 53 Ala. 481. We there said, "When it appears witnesses were examined by the grand jury, or the jury had before them legal documentary evidence, no inquiry into the sufficiency of the evidence is indulged." In this case, a competent witness was sworn and examined before the grand jury. The precise point urged in argument is, that the grand jury found the bill on insufficient testimony, in this: that while there was proof that a burglary had been committed as charged, no legal evidence was given before that body, showing that the accused was the guilty offender. To allow such inquiry and testimony, would be not only to disregard what was said in *Sparrenberger's case*, copied above, but would greatly retard and embarrass the administration of the law. The City Court rightfully refused to enter upon the inquiry of the *sufficiency* of the evidence before the grand jury.

2. In *Steele v. The State*, 61 Ala. 213, we laid down rules which are decisive of the question raised on the character of the punishment. The City Court followed the rule of construction we there laid down.

3. The question asked of the witness Hampton was collateral, and irrelevant to the issue, and could not be made a predicate for impeaching him.—2 Brick. Dig. 549, § 125. Further than this, if it had been relevant, counsel had no right to limit the witness' answer to a categorical yes or no. The rule requiring that the witness shall be interrogated as to such previous statements, as a preliminary to any offer to prove his prior contradictory statements, as a means of impeaching him, is without aim or meaning, unless it secures to the witness the right and opportunity of explaining what he did say. The law secures to him that right.—2 Brick. Dig. 548, § 117. So, if it were offered as evidence of the witness' unfriendly or hostile feelings towards the accused, it was equally his right to be heard in explanation of what he did say.

The judgment is affirmed.

[Henderson v. The State.]

Henderson v. The State.

Indictment for Obscene Language in Presence of Female.

1. *Constituents of offense.*—Abusive, insulting, or vulgar (i. e., obscene) language, uttered in a public highway, near enough to the premises of the prosecutor to be distinctly heard, and actually heard by his family, or by any member thereof, must be regarded as uttered in their presence (Code, § 4203), and as a violation of the statute.

FROM the Circuit Court of Pike.

Tried before the Hon. H. D. CLAYTON.

The indictment in this case charged that the defendant, King Henderson, "upon the public highway, near the premises of James Blackman, and in the presence of Ruthy B. Blackman, a female, did make use of abusive, insulting, or vulgar language, to-wit," specifying the words. The defendant pleaded not guilty, and issue was joined on that plea. "On the trial," as the bill of exceptions states, "James Blackman, the prosecutor, testified, that he lived immediately on the side of the public road leading from Troy to Elba, and occupied as a residence what was formerly used as a store-house on the side of the road, about two miles south of Troy in said county; that on or about the 14th February last (1880), defendant drove by his house in a wagon with three or four others, and when he got to a blacksmith shop, about thirty or forty yards from his house, he addressed the blacksmith, calling him Jim, and said, 'G—d—n you, you are a blacksmith, but I aint, and I don't want to be'; that he then passed by the house, and when he had gone about thirty yards beyond he turned around, and repeated the language used in the indictment. The witness stated that, at the time the language was used, he was standing within a few feet of his house, and his wife was standing in the front piazza of the house, and heard the language as above stated. Witness' wife also testified substantially to the same thing, declaring that she heard the language set out in the indictment; but she differed from him in stating that the language was used by the defendant when the wagon got in front of the house, or just beyond. Mrs. Johnson, another witness, testified, that she lived near said Blackman, and heard the defendant cursing as he passed along the road, but could not repeat his words; that she did not hear him use any vulgar

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language, nor the language set out in the indictment; that he was drinking when he passed, and he did not stop his wagon at all. The testimony of the defendant's witnesses tended to show that he was driving a wagon from Troy belonging to his employer, and was drinking; that he was cursing up to the time he got within about seventy-five yards of Blackman's house, but desisted until he got from forty to seventy-five yards beyond the house, when he commenced cursing again; that he had no animosity at the time to the blacksmith, and that the words used were not used in a manner to be abusive or insulting to him; and that they did not hear him use the language charged in the indictment.

"This being substantially all the evidence in the case, the court charged the jury, among other things, that if the defendant used the language charged in the indictment, along the public highway in this county, within twelve months before the finding of the indictment, near the premises of James Blackman, and in the presence of a female on the premises, he is guilty, although the words may not have been addressed to any particular person. To the latter part of this charge the defendant excepted.

"The court charged the jury, also, that if the defendant used abusive, insulting, or vulgar language, as charged, along the public highway, near the premises of James Blackman in this county, within twelve months before the finding of the indictment, in the hearing of a female on the said premises, he is guilty, if she heard it; and it is immaterial whether he was ten steps or a hundred yards distant. To the latter part of said charge the defendant excepted."

The defendant requested the court to instruct the jury as follows: 1. "Before the defendant can be convicted in this case, the proof must show that the language was used in the presence of some member of the family of the owner or possessor of the dwelling-house; and if it was used thirty, or forty, or seventy-five yards from the premises, and upon the public highway, then the defendant is not guilty." 2. "If the jury should find, from the evidence, that the defendant only used profane language, then he is not guilty, unless such language was used in an insulting or abusive manner to the owner of the dwelling-house." 3. "If the jury should find, from the evidence, that the language used was not addressed to any particular person, but was merely profane, and was the result of intoxication, the defendant is not guilty." The court refused each of these charges, and the defendant excepted to their refusal. The bill of exceptions does not show that these charges were in writing.

[Evans v. The State.]

J. D. GARDNER, for the defendant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—We do not think the Circuit Court erred in its rulings in this case. The intention of the statute was to protect the house and family, or any female that might be there, from the annoyance and offense that would be inflicted on them, if abusive, insulting, or vulgar (obscene) language, were uttered in their presence. The places protected against such offense, are the dwelling-house, curtilage thereof, and the public highway near such premises. We think such language, uttered in a public highway, near enough to the premises to be distinctly heard, and actually heard by the family of the owner of the premises, or by any member thereof, &c., must be regarded as uttered in their presence, under section 4203 of the Code of 1876.

The judgment is affirmed.

Evans *et al.* v. The State.

Scire Facias on Forfeited Recognizance.

1. *Sheriff's authority to admit to bail.*—When a person is committed to jail by a magistrate on a preliminary examination, charged with a bailable felony, the sheriff has no authority to admit him to bail, unless the magistrate indorsed on the commitment the amount of bail required (Code, § 4634); and a recognizance taken by him, without such indorsement, is void.

APPEAL from the Circuit Court of Cullman.

Tried before the Hon. JOHN HENDERSON.

The record in this case shows that, on a preliminary examination before a justice of the peace of said county of Cullman, Josiah Evans, charged with burglary, was committed to the custody of the jailor; the order of commitment directing the jailor to "detain him until he is legally discharged." There being no jail in said county, the prisoner was committed to the custody of the sheriff of Blount county; and that officer admitted him to bail a few days afterwards, in the sum of one thousand dollars, with William Conant and others as his sureties, conditioned for his appearance at the next term of the Circuit Court. Having failed to appear in accordance with the condition of the bond,

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a judgment *nisi* was duly entered against him and his sureties; and a *scire facias* thereon having been issued, and served on the sureties, they appeared, and insisted that the recognizance was void, on the ground that it was taken by the sheriff without authority of law, because the committing magistrate had not indorsed on the *mittimus* the amount of bail required. The court overruled this objection, and rendered a final judgment against the recognizers; which ruling and judgment, with other matters, they now assign as error.

C. C. HARRIS, for the appellants.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The defendant was committed to jail by a committing magistrate, on a charge of burglary. The offense was and is bailable; but the magistrate failed to indorse on the warrant of commitment the amount of bail required. Code of 1876, § 4684. Without this indorsement, the sheriff was without authority to take the bail-bond; and under all our decisions, no valid judgment can be rendered on such forfeited bond.—1 Brick. Dig. 206, § 106; *Antonez v. The State*, 26 Ala. 81; *Nat Gray v. The State*, 43 Ala. 41. See, also, *Callahan v. The State*, 60 Ala. 65, and authorities there cited. The language of this court, in the case of *Antonez v. The State*, is very strong; and following that and the other decisions of this court, the judgment of the Circuit Court is reversed, and this court, proceeding to render the judgment which the court below should have rendered, orders that said judgment be reversed and annulled. The cause will not be remanded.

Hunt et al. v. The State.

Scire Facias on Forfeited Recognizance.

1. *Judgment final against bail; what record must show.*—To support a final judgment by default on a forfeited recognizance, the record must show that the *scire facias* was returned “executed,” or that there were two returns of “not found,” which the statute (Code, § 4866) makes equivalent to personal service.

2. *Same; amendment of judgment.*—When the record shows that the *scire facias* was returned executed on all the recognizers but one, and judgment final was taken against all, without two returns as to the one not found,

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this court will amend the judgment by discontinuing the proceeding as to him, if the record shows no other error.

3. *Same; form of scire facias.*—Each of the parties to the recognizance, against whom a judgment *nisi* has been taken, should be allowed to show cause why the judgment should not be made absolute against him, and the *scire facias* should be so framed; and a judgment final against all should show that they all failed to appear, or, appearing, failed to show a sufficient excuse.

4. *Nature of proceeding; discontinuance.*—A *scire facias* on a forfeited recognizance is a civil cause, and is not discontinued by the unexplained failure of the court to take action on it for one or more terms.

APPEAL from the Circuit Court of Baldwin.

Tried before the Hon. H. T. TOULMIN.

The record in this case shows that, in October, 1873, an indictment was found in said court against John Little, for the murder of Zedo Shanklin; that at the April term, 1875, the defendant never having been arrested, an order was entered on the minutes, granting permission to the solicitor to withdraw and file the indictment, with leave to have it reinstated; that at the April term, 1877, in open court, by an order duly entered on the minutes, the defendant was admitted to bail, in the sum of one thousand dollars, with Henry J. Hunt and others as his sureties, conditioned for his appearance at the next term of the court, "and from term to term thereafter until discharged by law, to answer a criminal prosecution for murder;" that at the October term, 1877, said Little having failed to appear, a judgment *nisi* was entered against him and his sureties; that a *scire facias* was issued on this judgment on the 12th November, 1877, and returned executed on all the parties except said Little on the 8th February, 1878; and that a final judgment was thereupon rendered on the 21st April, 1879. The judgment *nisi* was in these words: "In this cause, it appearing to the satisfaction of the court that the defendant had entered into bail, in open court, with Henry J. Hunt, James W. O'neal, William O'neal, John B. Bryars and W. B. Bryars as his sureties, for his appearance at the present term of this court, and having failed to appear; it is ordered by the court, that the State of Alabama, for the use of Baldwin county, recover of the defendant, John Little, and of the said Henry J. Hunt," &c., "sureties on his bail, the sum of one thousand dollars, unless the said John Little appear, at the next term of this court, and show good and sufficient cause why this judgment should not be made absolute." The *scire facias* sets out a copy of this judgment, and the final judgment is as follows: "Came the State of Alabama, by its solicitor; and it appearing to the satisfaction of the court that judgment *nisi* against the said defendant and his sureties," naming them, "was rendered at the April term, 1878, of this court,

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for the sum of one thousand dollars, for the said defendant failing to appear and answer to an indictment against him for murder; it is ordered by the court, that the State of Alabama, for the use of Baldwin county, recover of the said defendant and his sureties, H. J. Hunt, James W. O'neal, William O'neal, J. B. Bryars, and W. B. Bryars, the sum of one thousand dollars, together with the costs," &c. This judgment is now assigned as error by the sureties.

ANDERSON & BOND, for the appellants.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The record in the present case shows but one *scire facias* issued, which was returned served on all the defendants except John Little; as to him, it was returned "not found." The judgment was made final against all the defendants. To authorize a judgment final against any party on forfeited recognizance, it is necessary that the *scire facias* be returned executed, or that there be two returns of "not found." This latter is declared to be equivalent to personal service.—Code of 1876, § 4866.

If there were no other error in this record, we would amend the judgment-entry by discontinuing the suit as to John Little, not served, and let it remain as a judgment final against the parties served.—*Savage v. Walshe*, 26 Ala. 619; *McDowell v. Mitchum*, 37 Ala. 417; *English v. Brown*, 9 Ala. 504. The *scire facias*, however, and the final judgment, are, each, imperfect. The language of the *scire facias* is, "unless the said John Little appear at the next term of this court, and show good and sufficient cause why the judgment should not be made absolute." The statute allows each of the defendants against whom a judgment *nisi* is rendered, to show cause why the judgment should not be made absolute. Code, § 4863. The *scire facias* should be so framed. True, it follows and copies the judgment *nisi*; but that can be amended, *nunc pro tunc*, in the court below, so as to allow each and all of the defendants to appear and show cause. The final judgment, to be formal, should recite that the defendants failed to appear, to show cause, or that the cause shown by them was adjudged insufficient.—Code of 1876, § 4876.

There is nothing in the argument, that the record fails to show any action was taken in the court below for one or two terms after the judgment *nisi* was rendered. There may have been a failure to hold those terms of the court, or the cause may not have been reached. This is a civil cause'

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and such causes at least are not discontinued by an unexplained failure of the court to take action for one or more terms.—*Ex parte Remson*, 31 Ala. 270.

Reversed and remanded.

Stewart v. The State.

Indictment for Burglary.

1. *Admissibility of defendant's declarations, as evidence for him.*—As a general rule, a person charged with crime can not make evidence for himself, by proof of his own declarations; and when they are admitted as evidence for him, it is as part of the *res gestæ*, or under some other recognized exception to the general rule.

2. *General question, calling for legal and illegal evidence.*—Error can not be predicated of the refusal to allow a question to be answered, unless it affirmatively appears that the answer would be legal evidence: if the question is general in its terms, calling for evidence which may be legal or illegal, it may be disallowed without error.

FROM the Circuit Court of Bullock.

Tried before the Hon. H. D. CLAYTON.

The defendant in this case was indicted, jointly with one James Williams, for breaking into and entering the dwelling-house of Spelman L. Latham, with intent to steal. The defendant, being on trial alone, pleaded not guilty; and issue was joined on that plea. During his trial, he reserved a bill of exceptions, on which the case is brought to this court, and which is as follows: "The State introduced one Farrior as a witness, who testified, that he lived about seventy yards from the house of said S. L. Latham; that, on the night the defendant is charged to have broken into said house, his attention was attracted by the *screaking* of the door of said house, and, on looking towards the house, saw the defendant and one Williams come out of it; that they came within about thirty yards of him, and ran off; that he and one Reese Holland pursued them about seventy yards, when the defendant fired off a pistol; that he and said Holland returned, and found some meal, meat, &c., which had been dropped by the parties who fled, and went to said Latham's house, to see what had been stolen; and that the defendant came up to the house, in about fifteen or twenty minutes after the firing of the pistol. On cross-examination by the defendant, said witness testified, without objection, that the defendant, when he came up, said that he heard a gun fired,

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and came to see what was the matter. The defendant introduced evidence tending to show that, at the time said house was broken open, he was at the house of one Joseph Walker. He then introduced said Reese Holland as a witness, who testified, that he was in charge of said Latham's house at the time it was broken open, and was there at the time referred to by said Farrior; that he did not recognize the defendant as one of the persons who had been in the house, and who fled; that he was present when the defendant came up, about fifteen or twenty minutes after the persons who had been in the house had fled, as testified by said Farrior, and heard what the defendant said when he came up. The defendant asked said witness, if he (defendant) said anything when he came up, and what it was that he said when he came up, about his reason for coming there. To these questions the solicitor objected, and the court sustained the objections, and refused to permit the questions to be answered; and the defendant excepted to this action of the court, as to each question."

J. N. ARRINGTON, for the defendant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—As a general rule, one charged with crime can not make evidence for himself, by proof of his own declarations. There are exceptions to this rule; such, for instance, as words which are themselves a part of an act, and thus tend to explain it. These are admitted as a part of the *res gestæ*. The question in this case, which the witness was not allowed to answer, was very general in its terms. Almost anything the accused may have said, tending to show why he came, or where he was when the pistol was fired and heard by him, or what information he had received which induced him to come, or for what purpose he came, would have been responsive to it. The Circuit Court was not informed what was expected to be proved by this witness; nor can we know whether the answer would have been legal evidence or not. If we were to reverse, and send the case back for another trial, it is not shown that the answer of the witness, when given, would not be illegal evidence. The record fails to show that the Circuit Court excluded legal evidence, and, therefore, it fails to show that error was committed. Error is never presumed, but must be shown.—*Burns v. The State*, 47 Ala. 370.

The judgment of the Circuit Court is affirmed.

[Peck v. The State.]

Peck *et al.* v. The State.

Scire Facias on Forfeited Recognizance.

1. *Nature of proceeding.*—A proceeding by *scire facias*, to fix the liability of bail on a forfeited recognizance in a criminal case, is a civil action.

2. *What defenses are available.*—If the recognizance was taken by an officer authorized by law to take and approve it, the sureties can not, in defense of a proceeding to fix their liability for the default of their principal, raise any objection to the manner of the arrest, nor to the sufficiency of the indictment.

3. *Objections to indictment, on account of defects in grand jury.*—Although an indictment will be quashed, or set aside, and will not support a judgment of conviction, when the record shows that it was preferred by a body illegally organized by the court as a grand jury; as when fifteen of the original venire appear and are accepted, and the court adds three others to them (Code, § 4754); yet such a defect or irregularity will not avail in a collateral proceeding, and can not be set up in defense of a proceeding to enforce a forfeited recognizance.

APPEAL from the Circuit Court of Hale.

Tried before the Hon. GEO. H. CRAIG.

The record in this case shows that, in April, 1878, an indictment for perjury was found in said court against Isaac Peck; and that, at the same term of the court, he was admitted to bail in the sum of one hundred and fifty dollars, with W. W. Powers and others as his sureties, conditioned for his appearance at the next term of the court, and from term to term thereafter until discharged by law. Having failed to appear at the next term, a conditional judgment was rendered against him and his sureties; and a *scire facias* was thereon issued, in usual and proper form, and served on all the sureties on the 6th March, 1879. At the next term, the sureties appeared by attorney, and, craving oyer of the "*scire facias*, the bond, the indictment, and the records of the court reciting the organization of the supposed grand jury which preferred the same," moved to quash the *scire facias*; which motion being overruled and refused, they demurred to the *scire facias*, assigning as causes of demurrer the same grounds on which the motion to quash was founded. These causes of demurrer, presented in different forms, assailed the validity of the recognizance, and of the indictment, because the record showed that, in the organization of the grand jury by which it was preferred, although fifteen of the persons originally summoned appeared and were accepted, the court added three other persons to them, increasing the number of

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grand jurors to eighteen. The court overruled the demurrer, and the motion to quash; and the defendants then pleaded, "in short by consent, the general issue, with leave to give in evidence any matter which might be specially pleaded;" and this issue being submitted to the court, without the intervention of a jury, on the facts shown by the record and papers in the cause, as above stated, the court rendered judgment final against the sureties. The final judgment, the refusal of the motion to quash, and the overruling of the demurrers, are now assigned as error.

THOS. R. ROULHAC, for the appellants.—The indictment, or paper purporting to be an indictment, is shown by the record to be absolutely void; not merely voidable, but utterly and entirely void, mere waste of paper.—*Finley v. The State*, 61 Ala. 201; *O'Byrnes v. The State*, 51 Ala. 27; *Miller v. The State*, 33 Miss. 356; *Portis v. The State*, 23 Miss. 578; *Keitler v. The State*, 4 Iowa, 291; *Nicholls v. The State*, 2 South. (N. J.) 539; *Harrington v. The State*, 36 Ala. 236. Being an absolute nullity, no rights or liabilities can proceed from it; nor can it work an estoppel.—*Bigelow on Estoppel*, 283; *Kercheval v. Triplett*, 1 A. K. Mar. 493; *Sinclair v. Jackson*, 8 Cowen, 543; *Chandler v. Ford*, 3 Ad. & El. 649; *Burr v. Lewis*, 6 Texas, 76; *Kennedy v. McCartney*, 4 Porter, 158; Comyn's Digest, *Estoppel*, E, 2. The case is totally unlike those cited for the appellee, where there were indictments regularly and legally preferred, though defective in form. The case of *Finley v. The State* is founded on principles of high public policy, and should be maintained in all its integrity. In determining a question of principle, the argument *ab convenienti* should be allowed but little weight.

H. C. TOMPKINS, Attorney-General, for the State.—On a trial like the present, no question can be raised as to the sufficiency of the indictment, nor whether there was any indictment at all.—*Weaver v. The State*, 18 Ala. 293; *Williams v. The State*, 20 Ala. 63; *Eldred v. The State*, 31 Ala. 393; *Vasser v. The State*, 32 Ala. 586; *State v. Sterrett*, 6 Halst.; *State v. Cooper*, 2 Blackf. 226. The recognizance was conditioned for the defendant's appearance "until discharged by law." That the indictment was returned by a grand jury not properly organized, and ought therefore to be quashed, does not discharge him: on the contrary, when the indictment is quashed, he must be held to answer a new indictment. Code, § 4819; *Ellison v. The State*, 8 Ala. 273; *Finley v. The State*, 61 Ala. 201.

[Ex parte Mayfield.]

STONE, J.—The proceeding to fix the liability of bail on a forfeited recognizance, taken in a State case, is a civil action. It is a rule of this court, well and long established, that in such proceeding no objection can be taken to the manner of arrest, or the sufficiency of the indictment, provided the recognizance or bond be taken by an officer authorized by law to take and approve such bond. The undertaking of bail binds the parties for the appearance of the defendant.—Code of 1876, §§ 4852, 4853; *The State v. Weaver*, 18 Ala. 293; *State v. Eldred*, 31 Ala. 393; and other authorities on the brief of the Attorney-General.

In the case of *Cross v. The State*, at this term, we discussed the question of irregularities in the selection, drawing, and summoning of grand jurors, under our statutes, and determined the character of errors or irregularities therein committed that would avail to quash or set aside an indictment, found by a body so constituted. We said, however, that such errors or irregularities will not avail, when collaterally presented. We have examined *Portis v. The State* (23 Miss. 578), *Miller v. The State* (33 Miss. 356), *Nichols vs. State* (2 South. N. J. 539), and *State of Iowa v. Carr* (4 Iowa, 289), and have no disposition to depart from our own well-considered rulings. A defendant out on bail, taken and approved by the proper officer, can not be heard to question the sufficiency of the indictment or warrant under which he was arrested, unless he is present in court to abide such order as the court may make in the premises.

The judgment is affirmed.

Ex parte Mayfield.

Motion to Establish Bill of Exceptions.

1. *Bill of exceptions; signing after adjournment of court, "by consent or agreement of counsel in writing."*—In a criminal case, the solicitor only—the officer whose duty it is to prosecute in behalf of the State—can consent in writing that a bill of exceptions may be signed by the presiding judge after the adjournment of the court for the term (Code, § 3113); and this court will not establish a bill, which the presiding judge below refused to examine or sign, on objection by the solicitor, although the associate counsel for the prosecution consented in writing that it might be signed after the adjournment of the court (STONE, J., dissenting.)

2. *Same; contents of.*—The presiding judge is not bound to sign a bill of exceptions, tendered for his signature, unless it truly states "the point, charge, opinion, or decision, wherein the court is supposed to err" (Code,

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§ 3108), and also sets forth "such a statement of the facts as is necessary to make it intelligible."

THIS was a motion by John Mayfield, to establish a bill of exceptions, which he claimed to have reserved during his trial at a late term of the Circuit Court of Lauderdale, Hon. W. B. Wood presiding, and which the presiding judge refused to examine or sign, on objection by the solicitor, because it was not presented for his signature before the adjournment of the court, and the solicitor had not consented in writing that it might be signed after the adjournment. The said Mayfield was indicted and tried, jointly with one Alexander Jones, for the murder of one Tobe Irvine; and on the trial he was convicted of murder in the first degree, and sentenced to be hanged, while said Jones was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for twenty-five years. The case was tried on Friday, and the court adjourned for the term on the next day. During the trial, numerous exceptions were duly reserved by Mayfield's counsel to rulings of the court in the matter of charges given and refused; but the bill of exceptions was not then prepared and signed. After the conclusion of the trial, R. O. Pickett, an attorney of the court, who had appeared for the State on the trial, and acted with the solicitor in conducting the prosecution, entered into a written agreement with Mayfield's counsel that a bill of exceptions might be prepared and signed by the presiding judge within ten days afterwards; and to this agreement he signed his own name and that of the solicitor. The solicitor, when informed of this agreement, refused to recognize it; but it does not appear that the defendant's counsel were informed of this fact, until after the adjournment of the court. A bill of exceptions was prepared by the defendant's counsel, and presented to the presiding judge for his signature, within ten days after the trial; but, on objection by the solicitor, he refused to examine or sign it. This is the bill of exceptions which the defendant now seeks to establish in this court; and in support of his motion he submits a certified copy of the record, the bill of exceptions so prepared and tendered, and affidavits as to its correctness, and as to the facts above stated. Counter affidavits are also submitted against the motion, denying the correctness of the bill sought to be established; and Judge Wood certifies to another bill, as accurately presenting the evidence adduced on the trial, and the charges given and refused.

BRAGG & THORINGTON, for the motion, cited Weeks on At-
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torneys, 343-4, 361, 371, 276-7; *Moore v. Easley*, 18 Ala. 619; Waite's Actions and Defenses, vol. 1, p. 434, § 1; 1 Brickell's Digest, 193, §§ 55, 56; Code, §§ 796, 797; *Rosenbaum v. The State*, 33 Ala. 354; *Judge v. The State*, 58 Ala. 405.

H. C. TOMPKINS, Attorney-General, for the State, cited Clark's Manual, §§ 1899-1912; *Garlington v. Jones*, 37 Ala. 240; Code, § 3111.

STONE, J.—I myself would prefer to hold that, under section 3113, Code of 1876, the agreement signed by counsel who was employed to aid in the prosecution of the defendants, was a sufficient "consent or agreement of counsel in writing," to authorize the presiding judge to consider and sign a bill of exceptions after the adjournment of the term. My brothers, however, think that only the solicitor—the law officer, whose duty it is to prosecute in behalf of the State—can give such consent, or enter into such agreement. There are strong reasons of public policy in favor of their views.

On the merits of the motion, there is a very decided preponderance of evidence, that the bill of exceptions tendered for signature does not, in its entirety, truly state "the point, charge, opinion or decision, wherein the court is supposed to err, with such a statement of the facts as is necessary to make it intelligible."—Code, § 3108. This being the case, it was not the duty of the presiding judge to sign the same.—*Garlington v. Jones*, 37 Ala. 240; *Wood v. Brown*, 8 Ala. 563; *Strawbridge v. The State*, 48 Ala. 308; *Alford v. Eubank*, 44 Ala. 276; *Tuskaloosa Co. v. Logan*, 50 Ala. 503; *Kirby v. Vann*, 51 Ala. 221; *Small v. McCalley*, *Ib.* 527; *Rotater v. Rotater*, 52 Ala. 111; *Chapman v. Holding*, 54 Ala. 61; *Judge v. The State*, 58 Ala. 402.

There being no valid agreement that a bill of exceptions might be signed after the adjournment of court, we would not be at liberty to establish the bill tendered, even if it truly set forth the points reserved, and the necessary statement of facts to show their pertinency. As to the bill approved by the presiding judge, and shown to be a true statement of the rulings excepted to, the case is not brought within any provision of the statute, and we have no authority to establish it. It is beyond the power of the circuit judge to sign it, in the absence of the solicitor's agreement that it may be signed in vacation.

Motion denied.

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Action for False Imprisonment.

1. *Jurisdiction defined.*—Jurisdiction is the power to hear and determine a cause, and it exists whenever an officer or tribunal is by law clothed with the capacity to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power.

2. *Municipal corporation; jurisdiction of mayor.*—When a person is brought before the mayor of a municipal corporation, charged with a violation of a by-law or ordinance of the corporation, the existence of a by-law or ordinance, established and promulgated by the proper authority prior to the commencement of the prosecution, is an essential element of his jurisdiction; but the reasonableness of the by-law or ordinance, while affecting its validity, is a question for his decision, and not a question affecting his jurisdiction in the particular case.

3. *Same; approval of ordinance by mayor.*—When the charter of a municipal corporation requires, that every ordinance passed by the board of aldermen shall be signed by the mayor, if approved by him, or, if disapproved, shall be passed over his veto by a two-thirds vote of a full board, it is not essential to the validity of an ordinance that it shall be signed by the mayor, when it is copied at length in the minutes of the board, which are signed by him, and which show that he voted for it on its passage by the board.

4. *Revised Code of city of Selma.*—Tested by the principle above declared, the ‘Revised Code of the City of Selma,’ adopted by an ordinance on the 31st December, 1870, was legally adopted.

5. *When action lies against judicial officer.*—A judicial officer, or person invested with judicial power, is not liable to a civil action for damages, at the suit of a person aggrieved by the exercise of that power in any particular case within the pale of his jurisdiction, though malice, or error, or both combined, may have entered into his decision.

APPEAL from the City Court of Selma.

Tried before the Hon. JONA. HARALSON.

This action was brought by H. H. Stewart against Noah Woodruff, to recover damages for an alleged false arrest and imprisonment, and was commenced on the 14th February, 1877. The arrest was under a warrant issued by the defendant, as the mayor of the city of Selma, on the 29th November, 1876, which was founded on an affidavit charging the offense of obstructing the side-walks of the city; and the imprisonment was under the judgment and sentence pronounced by the defendant on the hearing of that charge. The affidavit charged that the offense was committed by ‘H. H. Stewart & Co.,’ and the warrant was issued against them by that name, without any designation of the names of the individual partners. H. H. Stewart was arrested under the warrant, and appeared before said Woodruff as mayor, and

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pleaded not guilty to the charge; and the said Woodruff rendered judgment and sentence against him, on the 4th December, 1876, in these words: "Judgment, guilty. Sentence, \$25 fine, or fifty days labor on streets."

The pleadings in the case were somewhat complicated, but, as the case is presented in this court, they require no special notice. The defendant, "by consent, pleaded the general issue, with leave to give in evidence any matter of defense or justification which could be specially pleaded or replied;" and the cause was tried on issue thus joined. The defendant justified under an ordinance of the city of Selma, and the authority conferred on him as mayor by the charter and ordinances of the city. The ordinance which Stewart was charged to have violated is set out in the opinion of the court, which also states all the material facts connected with the adoption of the "Revised Code of the City of Selma," a compilation of laws embodying said ordinance. On objection by the plaintiff, the court refused to allow the said ordinance to be read in evidence to the jury, "but afterwards allowed it to be read as evidence, not as a law or ordinance of the city of Selma, but merely as a fact in mitigation of damages;" to which rulings exceptions were duly reserved by the defendant. After the exclusion of this ordinance as evidence, the defendant offered in evidence another ordinance in reference to obstructing the streets, which was embodied in a former compilation of the city laws, adopted on the 28th February, 1858; and this seems to have been admitted without objection. As to what was done or said on the plaintiff's trial before the mayor, both parties testified as witnesses, and there was some conflict in their testimony. As to the offense charged against the plaintiff in obstructing the streets, there was also some conflict in the evidence.

On all the evidence adduced, the court charged the jury, on the request in writing of the plaintiff, "If the jury believe the evidence, the plaintiff is entitled to recover, and the jury should find a verdict in his favor." The defendant excepted to this charge, and requested the court, in writing, to instruct the jury, "If the jury believe the evidence, they should find the issue in favor of the defendant." The court refused to give this charge, and the defendant excepted to its refusal. The charge given at the request of the plaintiff, and the refusal of the charge asked by the defendant, are now assigned as error.

Indorsed on the transcript is a memorandum, signed by the appellant's attorneys, in these words: "The appellant asks the court to consider the question of the jurisdiction of the mayor of Selma, under the facts in the record, to try and

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sentence Stewart; and if the court finds the law to be that, under the facts in the case, the appellant, as mayor, had no jurisdiction to try and sentence the appellee, and that the appellant was not protected from this suit by his judicial position, then the appellant desires that the court will not consider minor questions, but will consider them as waived by the appellant."

SUMTER LEA, and with him PETTUS & DAWSON, for the appellant.—If Woodruff, as mayor, had jurisdiction of the subject-matter, jurisdiction over the person might be acquired by the consent of the defendant.—*Snow v. Ray*, 2 Ala. 344; *Ortez v. Jewett*, 23 Ala. 662; *Morningstar v. The State*, 52 Ala. 406; 2 Brickell's Digest, 161, § 52. If he had jurisdiction of the subject-matter, the defendant is not liable for a mistaken exercise of judgment.—*Waterman on Trespass*, vol. 1, 358; *Morrow & Wilson v. Bird*, 6 Ala. 834; *Burnett v. Craig*, 32 Ala. 734. The question of the case, then, is, whether the mayor had jurisdiction in the premises. The charter of the city of Selma, by its 25th and 62d sections, confers on the mayor jurisdiction to try all persons charged with violations of city ordinances; and the State constitution clothes him also with the jurisdiction of a justice of the peace. The plaintiff was charged with the offense of obstructing the side-walks of the city, and was tried for that offense; an offense clearly within the jurisdiction of the mayor, because conferred on him by the charter of the city, and an ordinance passed in pursuance thereof. If the ordinance in the Revised Code of the city was never legally adopted, then the prior ordinance of 1858 was never repealed, and governed the case. U. S. Digest, N. S., 1870, p. 507, § 22. The offense, moreover, was a misdemeanor at common law, and was within the jurisdiction of the appellant.—6 U. S. Digest, 560, § 28; Code, § 4447; *Hoole & Paullin v. Attorney-General*, 22 Ala. 194; 1 Russell on Crimes, ch. 30, § 2; Const. Ala., art. 1, § 9. As to the reasonableness of the by-law, see 6 East, 430.

BROOKS & ROY, and W. C. WARD, *contra*.—1. The ordinance, under which the plaintiff was prosecuted, was never enacted as prescribed and required by the city charter. It was never acted upon, or approved by the mayor, in his official capacity, as a co-ordinate branch of the municipal legislature; and his participation in the proceedings of the council, and his signature to the minutes, are not a compliance with the requisitions of the charter.—*Graham v. Carondolet*, 33 Mo. 262; 1 Dillon on Mun. Corp. § 265, notes.

2. If the ordinance had been legally and regularly adopted,
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it would nevertheless be void, because against common right, and manifestly unreasonable.—1 Dillon, M. C. §§ 253–61, and authorities there cited; *Ib.* §§ 581, 585; Shear. & Redf. on Negligence, §§ 366–67; Angell & Ames on Corp. §§ 347, 357, 360, 363; 35 N. H. 257; 44 N. H. 285; 4 Amer. Rep. 248; *Beroujohn v. Mobile*, 27 Ala. 60; 6 Ala. 901; 30 Ala. 461; 31 Ala. 562; 28 Ala. 577; 5 Cowen, 462.

3. The ordinance of 1858, if it can be invoked, is void for the same reasons.—Authorities last above cited. But that ordinance was repealed by the new charters subsequently adopted, which contain provisions inconsistent with and repugnant to it. Under the ordinance, the penalty is unlimited; under the new charter, no penalty can exceed \$100. The ordinance can not be changed, to make it conform to the charter; and if the penalty is struck out, the ordinance becomes nugatory.—Dillon, M. C. § 272; *State v. Cleveland*, 3 R. I. 117; *Bowman v. St. John*, 47 Illinois, 337; *Ashton v. Ellsworth*, 48 Illinois, 299.

4. The mayor did not acquire jurisdiction by reason of the fact that the offense charged was a violation of the laws of the State. The attempt in the charter to give him jurisdiction to try offenders for violations of the State laws, is clearly unconstitutional; for, if valid, it would give him power to try offenders for any felony, without indictment, trial by jury, or due legal process. Nor can the grant of power be separated, or split up, so as to preserve any part of it.—*United States v. Reese*, 2 Otto, 221.

5. There being, then, no valid and operative ordinance or statute, under which the prosecution could be maintained, the mayor had no jurisdiction; the entire proceeding was null and void, and all who participated in it were trespassers.—*Duckworth v. Johnson*, 7 Ala. 578; *Noles v. State*, 24 Ala. 695; *Sasnett v. Weathers*, 21 Ala. 674; *Crumpton v. Newman*, 12 Ala. 199; 4 Gray, 73; 2 Gray, 120; 13 John. 444; 15 John. 493; 1 Wendell, 210; 5 Wendell, 180, 276; 13 Wendell, 46; 19 John. 39; 8 Cowen, 68; 6 U. S. Digest, 559, §§ 5, 6, 11; 11 Wendell, 94; 5 Ired. Law, 157; 2 Hilliard on Torts, § 6.

BRICKELL, C. J.—There are numerous exceptions to rulings of the City Court, but there are only two assignments of error. The *first* is, that the City Court erred in refusing, at the instance of the appellant, to charge the jury that, if they believed the evidence, they must find a verdict in his favor. The *second* is, that the City Court erred in charging the jury, at the instance of the appellee, if they believed the evidence, their verdict must be in his favor. It may be the evidence was not so free from conflict, so clear and undispu-

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ted, or that there were inferences to be drawn from it, necessary to support the appellee's action, which it was the exclusive province of the jury to draw; and that the City Court was, consequently, in error in giving the general charge. We are relieved from considering that question, by the waiver of appellant, indorsed on the record, of all other questions, than the jurisdiction of the appellant, as mayor of the city of Selma, upon the facts found in the bill of exceptions, to cause the arrest, try, and sentence to punishment the appellee, on a charge of obstructing the *side-walks* of the city, the acts constituting the alleged wrongs for which the appellee seeks to recover damages.

The case is thus resolved into a very narrow issue. The duty and authority of the mayor of the city of Selma is very clearly defined in the charter. So far as it is now involved, it is expressed in these words in the 25th section: "to see that the laws of the corporation be duly executed; and he shall hold a court once in each day of the week, if necessary (Sundays excepted), for the trial of all offenders against the city laws and ordinances;" and more explicitly, and at large, in the 62d section, which declares: "that the mayor, or either of the councilmen of said city, shall issue process as a justice of the peace, against any person who is not in custody of the city authorities, for offenses committed under this act, and for a breach or violation of all or any of the by-laws or ordinances of the said corporation, or of the laws of the State, directed to any public officer of said corporation, who shall bring the offenders, in pursuance of the said process, before the mayor, or before any one or more of the councilmen; and the mayor, or councilman, shall proceed to try the offender, and may examine such witnesses as may be offered, and shall, if desired, subpoena witnesses; and in default of their appearance, after service of subpoena, shall fine such witnesses as may have been subpoenaed, and failed to appear, or render a good excuse, not exceeding twenty dollars, to be enforced as other fines are enforced. The offenders and the corporation shall have an opportunity to produce witnesses; and the mayor, or councilman, trying said cause, after hearing the testimony, shall pronounce such judgment as to him shall appear just and legal. The mayor, or councilman, trying such offender, shall have power to fine, or to imprison, or to fine and imprison, or to sentence the offender to labor on the streets or public works of the city, or for the city; and in case the fine and costs are not paid, to require the party thus in default to work out the fine and costs, under the direction of the city officers; *Provided*, that no fine shall exceed one hundred dollars, and no imprisonment, or work

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on the streets or public works, or for the city, shall exceed ninety days."

It is plain, these provisions contemplate and authorize a proceeding in form and substance judicial, and that the grant is of judicial power. Plenary jurisdiction is conferred on the mayor of the city, to issue process for the arrest of any person, not in custody of the city authorities, who may be charged with a violation of any by-law or ordinance of the city, and to pronounce, after the appearance of the person charged, upon his guilt or innocence; and if he is adjudged guilty, to punish him by fine or imprisonment, or both; or to sentence him to labor; or, if a fine is imposed, which is not paid, to sentence him to work it out, under the prescribed limitations, which were not in this case exceeded. The *subject-matter* of the jurisdiction is the violation of an ordinance or by-law, which the governing, legislative body of the city have the power under the charter to enact; or, rather, a charge of such violation, for when the charge is made, the jurisdiction is called into exercise, and the mayor must adjudge whether the particular facts constitute a violation.

Jurisdiction is the power to hear and determine a cause; and it exists whenever an officer or tribunal is by law clothed with the capacity "to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power."—*Hunt v. Hunt*, 72 N. Y. 229-30; *Lamar v. Gunter*, 39 Ala. 324. Limiting our observations to the circumstances of this case, an essential element of the jurisdiction of the mayor is a by-law, or ordinance of the city, established and promulgated prior to the commencement of the prosecution.

The mayor and councilmen of the city had adopted a "Revised Code" of the by-laws and ordinances of the city. The city had been an organized municipal corporation for many years, and its charter had been altered and amended, its corporate power enlarged and varied, by several special legislative enactments. This Code was adopted by ordinance on the 31st December, 1870, at an adjourned regular meeting of the board of mayor and councilmen, by a vote of *ayes and noes*, the mayor and five councilmen voting for its adoption, and two councilmen voting in the negative. The proceedings of the meeting are signed by the mayor, and countersigned by the clerk of the city council. When the ordinance was adopted, the charter approved October 10th, 1868 (Pamph. Acts, 1868, pp. 227-248), was of force; the 24th section of which provided, that "every ordinance, which shall have been passed by the board, shall be presented to the

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mayor, for his approval and signature; and if he approves and signs the same, it shall become a law; and if he should not approve it, he shall return it, with his objections, to the board; and at its next regular meeting, in case of his non-approval, or failure to return as aforesaid, a vote of two-thirds of the full board shall make it a law."

This Code, it is fair to presume, was a compilation of former ordinances, so far as they were consistent with the new charter, the constitution and laws of the State, the new and changed condition, civilly and politically, of the people of the State; as well as the introduction of new by-laws and ordinances, which the provisions of the new charter required. As containing the body of the law of the city as established and promulgated by the governing, legislative power, it had been uniformly recognized and acted upon, from the time of the adoption of the ordinance we are considering, without objection or dissent from any source, until the institution of this suit, or the commencement of this controversy,—a period of nearly six years.

It can not be doubted, that an express power and duty was devolved on the mayor and councilmen of the city, "to keep in repair all necessary streets, avenues, drains, and sewers, and to pass regulations necessary for the preservation of the same," and to pass such by-laws and ordinances as were necessary and proper for the execution of the power and performance of the duty. The duty was of that kind denominated an absolute and perfect corporate duty; and if from its neglect an injury resulted to an individual, who was free from fault, an action for damages against the corporation could be supported.—*Smoot v. Mayor*, 24 Ala. 112; *Campbell v. City Council of Montgomery*, 53 Ala. 527; 2 Dill. Mun. Cor. § 789; *Weightman v. Washington*, 1 Black, (U. S.) 40. Subject to this duty and liability, in consequence of the power and privileges conferred on the corporation, the power to keep the streets free from obstructions—to keep them open for the safe and convenient transit of all persons—to prevent any use of them incommoding the public, and to ordain all such ordinances as were proper and meet to accomplish this end—can not be doubted.—2 Dill. Mun. Cor. § 538. The *side-walks* are but parts of the street, so far as the authority and duty of the city council in this respect may be concerned. Their primary and appropriate use is the free and unobstructed passage of the public.—*White v. Kent*, 11 Ohio St. 553. The cases are numerous, in which municipal corporations have been subjected to liability in consequence of injuries resulting to individuals, because of obstructions they have suffered others to place upon *side-walks*; or because of

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the acts of others, done with their knowledge; or because of their own omissions to keep them in repair, whereby they became and were unsafe and dangerous.—*Chicago v. Robbins*, 2 Black, (U. S.) 418; *Manchester v. City of Hartford*, 30 Conn. 118; *Hall v. City of Lowell*, 10 Cush. 260; *Hubbard v. City of Concord*, 35 N. H. 52.

It was shown in evidence, that the 333d section of the Revised Code of the Laws of the City is in the following words: "Any person who piles, places, deposits, receives, discharges, packs or unpacks any goods, wares or merchandise, upon the side-walk, must, on conviction, be punished by fine, fine and imprisonment, or hard labor for the city. But this section must not be so construed as to prevent persons from rolling or moving, without stopping, goods to or from store, across the side-walk." It is under this section the proceedings against the appellee were had, and judgment and sentence were pronounced by the appellant in his capacity of mayor, and whilst holding a court in obedience to the charter. The validity of this section, and of the whole body of corporate law styled the Revised Code, is assailed, because the ordinance adopting it *was not presented to the mayor for his approval and signature, and, if approved, was not signed by him*; or, if disapproved, was not returned to the common council, with his objections, and enacted by a two-thirds vote, as required by the 24th section of the charter of 1868.

The purpose of this provision is plain. The separate, independent approval of the mayor, upon his own individual responsibility, clearly manifested by his signature; or his disapproval, accompanied with the reasons for it, operating as a veto upon the legislative action of the common council, requiring further time for deliberation, and a larger vote before the proposed ordinance could become a corporate law, was intended as an additional security against hasty, unwise and inexpedient corporate legislation. There can be no construction given this provision of the charter, which will defeat its purposes, or lessen its usefulness. At the same time, there must not be a construction so rigid—clinging closely to the letter, rather than to the spirit—as would draw upon the law the reproach of harshness and absurdity.

It is a general rule of law, that statutes directing the mode of proceeding of public officers, relating to the time and manner, are directory, unless they use negative words, or there is something showing plainly a different intent.—*Sedgwick*, Stat. and Con. Law, 316, note a; *Striker v. Kelly*, 7 Hill, 9; 25 Wend. 696; *Savage v. Walshe*, 26 Ala. 620; *Corliss v. Corliss*, 8 Verm. 373; *People v. Cook*, 14 Barb. 259. The substance, the essential requisites of the statute, are not dis-

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regarded or disobeyed. These must be observed, and a compliance with them is indispensable. It is form, not substance, the courts may dispense with, that the substance may not be lost in pursuit of the shadow. The legislative department of the government of the city of Selma can prescribe by-laws and ordinances, only in exercise of the powers conferred by the charter, and in obedience to its provisions. The common council can, by no action they may take, nor by any omission, deprive the mayor of the participation in their legislation, to which the charter entitles him. An ordinance not presented to him, which he has not had the opportunity of approving or disapproving, could not become a corporate law. That is not the question we are considering. The ordinance adopting the Revised Code was presented to a meeting of the common council, when the mayor was presiding, and seven of the eight councilmen were present. It was adopted, two of the councilmen only voting in the negative. In the minutes of the proceedings, it is set out in full, and these minutes are signed by the mayor. The matter of substance is the approval of the ordinance by the mayor, and not the form or manner in which it may be manifested, so that it is plainly manifested in writing, as all corporate action of this character must be manifested.—1 Dill. Mun. Cor. §§ 265–66. Signing the ordinance, or an indorsement upon it, is not the only mode in which approval can be manifested. It may well be conceived that the power conferred on the mayor, of disapproving the legislative action of the council, will be very cautiously and sparingly exercised. Much of doubt as to the policy of particular ordinances would be resolved in favor of the action of a majority of the council, rather than by disapproval to defeat or thwart the will they had expressed. It could happen that, by a message in writing, stating the reasons which had induced him to hesitate, and ultimately to approve, the mayor would return the proposed ordinance. From inadvertence, the ordinance may not have been signed. Yet the message, entered at large on the minutes of the council, is signed, and is preserved with the corporate records and files; and for years the validity of the ordinance is recognized, the corporation being governed by it. Can it be possible that a court could be justified in pronouncing the invalidity of the ordinance, because it did not bear the signature of the mayor, though his approval was clearly manifested by the corporate records, nullifying all corporate action founded on the ordinance, converting into trespassers the corporate officers who in good faith had executed it? While we hold the approval of the mayor, or his disapproval, and in that event the enact-

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ment of the ordinance in the mode prescribed by the statute, is essential to its validity; all the purposes of the statute are satisfied, when the approval distinctly and affirmatively appears upon the corporate records or files which bear his signature, though the ordinance is not signed by him. The rule might be different, if, as in the cases to which we have referred, the statute contained negative or restraining words. The mayor and councilmen, or other officers of a municipal corporation, are not usually selected because of their learning in the law, their nice observance of its forms, or their instruction in fine distinctions. If their action is to be subjected to rigid criticism, much of it done in good faith, and in the spirit of their defined authority, would be avoided. We affirm the validity of the ordinance, and that the mayor had rightfully the jurisdiction exercised in issuing the warrant for the arrest, and in the conviction of the appellee.

The argument addressed to the reasonableness of the section of the Revised Code, under which the conviction was had, we do not now consider. The mayor, having jurisdiction, was invested with full authority to pass upon that question. Error may or not have intervened in its determination. If it did, the law appoints the mode for its correction. A court is entitled to full protection against an error of judgment, whenever its proceedings are collaterally assailed.—*Craig v. Burnett*, 32 Ala. 728.

These conclusions are decisive of the case. That a judicial officer, the highest or lowest, keeping within the pale of his jurisdiction, can not be made answerable at the suit of an individual, supposing himself aggrieved, is a principle too firmly established, and has been recently the subject of such extended discussion in this court, that we are content with its simple announcement.—*Irion v. Lewis*, 56 Ala. 190; *Busteed v. Parsons*, 54 Ala. 303. We may discard all averments of malice, and whatever of evidence there may be in support of them. Malice and error combined, nor either separately, will furnish a private cause of action against a judge. Malice, or corruption, in a judge, though he keeps strictly within the pale of his jurisdiction, and adheres to the very letter of the law, is the gravest of offenses, which the law provides adequate and appropriate remedies to punish. Individual wrong, suffered from them, is merged in the higher wrong to society and the State, and must be redressed by the remedies the State can pursue against the unjust judge.

The charge requested by the appellant ought to have been given. Because of its refusal, the judgment must be reversed, and the cause remanded.

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Garnishment on Judgment.

1. *Garnishment of debt due for taxes.*—On grounds of public policy, a judgment creditor of a municipal corporation can not, by process of garnishment, reach and subject funds accruing to it by taxation, either while in the course of collection by suit, or after they have been paid into its treasury. (Overruling *Smoot v. Hart*, 33 Ala. 69).

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. H. T. TOULMIN.

The appellant in this case, having obtained a judgment against the mayor, aldermen, and common council of the city of Mobile, and a return of "No property found" on an execution issued on said judgment, then sued out a writ of garnishment against the appellee, as the debtor of said corporation. The garnishee appeared, and answered, admitting an indebtedness to the said city of Mobile, for taxes assessed and unpaid, amounting to \$2,733.34, with interest; for which sum he had given his note to the city, and, the note not being paid at maturity, the city had recovered a judgment against him for the amount due on it; and he insisted in his answer, at the instance of the city, that this debt could not be reached and subjected by garnishment. The plaintiff's judgment against the city of Mobile was rendered on the 28th March, 1877; and the city's judgment against the garnishee, which was for \$3,343.15, was rendered on the 10th March, 1877. There being no controversy about the facts, the court discharged the garnishee on his answer; and this ruling and judgment, to which an exception was reserved by the plaintiff, is now assigned as error.

THOS. H. HERNDON, with whom were W. BOYLES, and LINDSAY & DEGROSHE, for the appellant.—1. Although the original indebtedness of the garnishee was for taxes due the city, yet his negotiable promissory note had been given and accepted in payment of that debt, and the note had been reduced to judgment. The debt and the note were merged in the judgment and extinguished, and no action could afterwards be maintained on either.—Chitty on Contracts, 681. The note bore interest after maturity, which was included in the judgment, and the judgment also bears interest. But no

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interest accrues on taxes, unless specially given; and taxes can not be collected by action as an ordinary debt, unless such action is expressly authorized by statute, or unless the statute fails to provide any other remedy.—Hilliard on Taxes, 441, 444; 26 Vermont, 482, 486; 8 Metc. (Mass.) 393; 2 Dutcher, 398; 50 Maine, 376. The debt for taxes being thus converted into an ordinary debt, to which interest and other incidents attach by law, and this by the voluntary act of the city (the creditor), it is not exempt from garnishment. 1 Dillon on Mun. Cor. 186; 6 La. Ann. 570.

2. But, if the court can look behind the judgment, and inquire into the original consideration on which it was founded, the case of *Smoot v. Hart*, 33 Ala. 69, is decisive of the question. The authority of that case has never been questioned, and the statute therein construed is yet unchanged.

B. BRAGG, *contra*.—On grounds of public policy, the revenues of a municipal corporation, accruing from taxation, can not be reached or intercepted by garnishment, either in the treasury, or while in transit to it.—*Edgerton v. Municipality*, 1 La. Ann. 435; Dillon on Mun. Cor. 184, § 64, and cases cited.

MANNING, J.—There can be no question that the money, which the city was endeavoring to collect from Calhoun by suit, was a part of its ordinary revenues. This fact was not changed by the circumstance that a note had been taken therefor, and an action on it prosecuted to judgment. The amount of it, when collected, would go into the municipal treasury, as a portion of its regularly levied income from taxation. Could it be intercepted and diverted therefrom, while in the process of collection?

In *Edgerton v. Municipality* (1 La. Ann. 435), the following observations were made: "On the first view of this question" (said ROST, J.) "there is something very repugnant to the moral sense, in the idea that a municipal corporation should contract debts, and that, having no resources but the taxes which are due to it, these should not be subjected by legal process to the satisfaction of its creditors. This consideration, deduced from the principles of moral duty, has only given way to the more enlarged contemplation of the great and paramount interests of public order, and the principles of government." It was under the influence of the moral sense, referred to in the former part of this passage, that the decision cited for appellant, in *Smoot v. Hart* (33 Ala. 69), was rendered. It was there held, that the moneys

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collected by, and in the hands of the marshal of Wetumpka, as a part of the revenue of that town, might be attached by garnishment, for a debt due from it to one of its creditors. This construction was given to a section of the Code expressed as follows: "If a judgment creditor of an existing corporation, whose execution has been returned 'no property found,' his agent, or attorney, make affidavit before the clerk . . . that a certain person is supposed to be indebted to the corporation, as a stockholder of the corporation, or otherwise, he is entitled to process of garnishment, returnable forthwith, if in term time, or to the next term, if in vacation," &c.—Code of 1876, § 3220.

We are of the opinion, that there was error in the interpretation given to that section. It related to corporations of a private character. This is indicated by the reference in it to the liability of the "stockholder" as such, of the corporations contemplated. Municipal corporations, as Mr. Dillon says, are instituted by the supreme authority of a State, for the public good. They exercise, by delegation from the legislature, a portion of the sovereign power. The main object of their creation is to act as administrative agencies for the State, and to provide for the police and local government of certain designated civil divisions of its territory. To this end, they are invested with governmental powers, and charged with civil, political, and municipal duties. To enable them beneficially to exercise these powers, and to discharge these duties, they are clothed with the authority to raise revenues by taxation, and by other modes, as by fines and penalties. Deprived of its regular and adequate supply of revenue, such a corporation is practically destroyed, and the very ends of its erection thwarted. Based upon considerations of this character, it is the settled doctrine of the law, that the taxes and public revenues of such corporations cannot be seized under executions against them, either in the treasury, or when in transit to it. The doctrine of the inviolability of the public revenues by the creditors is maintained, although the corporation is in debt, and has no means of payment but the taxes which it is authorized to collect.—1 Dillon on Mun. Cor. § 64, and cases cited. These are valid reasons, founded on public policy, concerning affairs and matters of great importance to society, why, without express statutory authority, the revenue of these bodies politic should not be subject to seizure or sequestration by garnishment for individual creditors.

Other like considerations, founded on the disorder which would be thereby produced in public accounts and administration, are stated in a case somewhat similar, *Pruitt v.*

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Armstrong, recently decided in this court, 56 Ala. 308. We feel constrained, therefore, to declare the decision in *Smoot v. Hart* (*supra*) is not law, and that the case is overruled.

Let the judgment of the Circuit Court in the cause before us be affirmed.

Mobile & Girard Railroad Company v. Copeland.

Action against Common Carrier for Loss of Goods.

1. *Common carrier; liability for loss of goods beyond his route.*—As to the liability of a common carrier who receives goods consigned to a point beyond the terminus of his own line or route, and does not by express agreement limit his liability to losses or injuries over his own line, there is a conflict of judicial decisions; but this court adopts the rule laid down in the leading English case, *Muschamp v. L. & P. Railway Co.* (8 Mees. & W. 421), and holds the carrier liable for the non-delivery of the goods at the designated place.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. H. D. CLAYTON.

This action was brought by John T. Copeland against the appellant, as a common carrier, to recover \$1200 “as damages for the failure to deliver certain goods, to-wit, one bale of bedding, received by the said railroad company as a common carrier, at Troy, Alabama, on the 20th November, 1877, to be delivered to the plaintiff at Texarkana, Texas, for a reward; which said railroad company failed to do.” The only plea was the general issue, and the cause was tried on issue joined on that plea. On the trial, as appears from the bill of exceptions, the plaintiff offered in evidence the receipt, or bill of lading for the goods, given to him by the agent of the railroad company, at Troy, in said county of Pike; which receipt only stated that the goods were received from the plaintiff, at Troy, on the 20th November, 1877, for shipment to Texarkana, Texas, and contained no conditions or stipulations whatever. “The plaintiff further proved, that the bale of bedding mentioned in said receipt, as weighing 340 pounds, was his property, and was worth \$1,170; that, being about to emigrate to Texas, he went to Troy with his family, for the purpose of setting out on his journey over the Mobile and Girard railroad; that he had, among other things, said bale of bedding, which he asked might accompany him as baggage usually allowed to passengers, and offered to pay for it; that the agent refused, and said it must

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go as freight, and that he could pay for it at Texarkana, and that it would reach there in three days or a week after plaintiff's arrival; that the agent then executed the receipt, and he (plaintiff) accepted it. It was further proved, that the said bale of bedding has been demanded, at the proper place, in Texarkana, Texas; that the plaintiff has failed to procure, and the defendant has failed to deliver it. The defendants proved, that they carried the said bale of bedding to Union Springs, Alabama, and there delivered it to the Montgomery and Eufaula Railroad Company, a separate and distinct railroad, in the direct and proper line of transportation, over which defendants have no control, and between which and defendants there is no understanding or agreement, as to the transportation of freight, except that usual and generally existing between connecting railroads and other kinds of common carriers. The bale of bedding was lost, some where on the route, after it was delivered to the said Montgomery and Eufaula Railroad Company." This being all the evidence in the case, material to the points here presented for revision, the court charged the jury, on the request in writing of the plaintiff, "if they believed the evidence, they must find for the plaintiff;" and this charge, to which the defendant excepted, is now assigned as error.

NORMAN & WILSON, for appellant.—In England, the rule is settled, that the receipt of goods by a common carrier, consigned to a point beyond the terminus of his own route, creates a *prima facie* contract on his part to deliver them safely at their destination, or to respond in damages; and this doctrine has been held by some of the American courts. But the prevailing rule in the United States holds the carrier only bound, in the absence of a special contract extending his liability, to deliver the goods in good condition, at the end of his route, to the succeeding carrier on the route of their destination. And this rule is based on sound principles; for the carrier is bound by his official duty to receive goods tendered to him for transportation, and to carry them to the end of his route, but no further; and when any one attempts to hold him liable for a loss or injury beyond and outside of his official duty, the liability can only arise from a special contract. The official duty and liability are created and imposed by law; and additional stipulations, limiting or extending that liability, can only arise from special contract.—*Rawson v. Holland*, 59 N. Y. 611; *Reed v. United States Express Co.*, 48 N. Y. 462; *Skinner v. Hall*, 60 Maine, 477; *Perkins v. Portland, S. & P. Railroad Co.*, 47 Maine, 573; *Railroad Co. v. Manufacturing Co.*, 16 Wallace,

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318; *Gray v. Jackson*, 51 N. H. 9; *Burroughs v. Norwich Railroad Co.*, 100 Mass. 26; *Baltimore Railroad Co. v. Schumacher*, 29 Md. 168; *McMillan v. Mich. So. Railroad Co.*, 16 Mich. 79; *Amer. Express Co. v. Second National Bank*, 69 Penn. St. 394; *Hood v. N. Y. & N. H. Railroad Co.*, 22 Conn. 1; *Converse v. Norwich & N. Y. Trans. Co.*, 33 Conn. 177; *Lawrence v. Winona Railroad Co.*, 15 Minn. 390; *Mullasky v. Phil. Railroad Co.*, 3 Phil. (Penn.) 114; *M. & W. P. Railroad Co. v. Moore*, 51 Ala. 516; *So. Express Co. v. Hess*, 53 Ala. 19; *Ellsworth v. Tartt*, 26 Ala. 733; *Redfield on Carriers*, ch. 14.

W. D. WOOD, *contra*.—A railroad company, as a common carrier, receiving goods for shipment to a point beyond the terminus of its own route, is liable to the owner for a loss or injury occurring beyond its line, in the absence of an express contract to the contrary. This is the settled law of England, since the decision of the leading case of *Muschamp v. Lancaster & Preston Railway*, 8 Mees. & W. 421. It is founded on the same principles of public policy which regulate and determine all the duties and liabilities of common carriers, and it has been adopted by many of the courts in the several States of the Union.—*Weed v. S. & S. Railway*, 19 Wendell, 524; *F. & M. Bank v. Ch. Transportation Co.*, 23 Vermont, 186; *McCluer v. M. & L. Railroad*, 13 Gray, 124; *Rogers v. R. & B. Railroad*, 27 Vermont, 110; *Wilcox v. Parmelee*, 3 Sandf. 610; *Nashua Lock Co. v. W. & N. Railroad*, 48 N. H. 339; *Gray v. Jackson*, 51 N. H. 9; *Foy v. T. & B. Railroad*, 24 Barbour, 382; *Schroeder v. Hudson River Railroad*, 5 Duer, 55; *Kyle v. Laurens Railroad*, 10 Rich. (S. C.) Law, 282; *Central Railroad v. Copeland*, 24 Illinois, 332; *Central Railroad v. McComas*, 33 Illinois, 185; *Angle v. M. & M. Railroad*, 9 Iowa, 487; *St. John v. Van Santvoord*, 25 Wend. 660. Some of the American cases hold the carrier liable for a loss occurring beyond his line, if he charged and collected freight for the whole route.—19 Wendell, 534; 3 Sandf. 610; 17 N. Y. 315; 24 N. Y. 269; 18 Penn. 224; 21 Wisc. 582; 31 Cal. 52; 4 Sneed, 203. Whether the freight charges are paid at one end of the line or the other, can make no difference in the principle, especially where, as in this case, there was an offer to pay to the receiving company.

BRICKELL, C. J.—The liability of a common carrier, receiving goods for transportation, directed to a place beyond the terminus of his own line or route, who does not by express agreement limit his duty and responsibility for the non-delivery of the goods at the point of destination, is for the first time presented for the consideration and decision of

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this court. The importance of the question is manifest, and it is to be regretted that it is embarrassed by an irreconcilable conflict of authority in this country. In *Ellsworth v. Tartt*, 26 Ala. 733, as in *M. & W. R. R. Co. v. Moore*, 51 Ala. 394, the question was as to the liability of an intermediate carrier, for a loss or injury *not occurring on his own route*; and it was held, that, in the absence of a special contract, or of some special relation between carriers having control of different parts of a line or route of transportation, each carrier is liable only for a loss or injury on his own route or line. We have no inclination to depart from these decisions, applied to the particular facts of the cases; but it is obvious they do not meet the question now presented.

The leading case in England, upon this question—that of *Muschamp v. L. & P. Railway Co.*, 8 Mees. & Welsby, 421 (which has been approved and followed, in numerous subsequent cases), settled the rule, that where a carrier receives goods, directed to a place beyond the terminus of his own route, without limiting his liability by express agreement, by the acceptance of the goods he assumes the duty, and incurs the obligation, to deliver them safely at the point of destination. A number of the American courts have adopted and followed this rule, and a number have rejected and disapproved it, as unjust to the carrier, and unnecessary upon any considerations of public policy. The authorities are collected in the recent work, *Hutchinson on Carriers*, §§ 148–9, and notes. To review them is not possible, without extending this opinion to an unusual length; and we shall simply express briefly the reasons which induce us to adhere to the rule laid down in *Muschamp's case*.

It must be regarded as settled, that a carrier, though a corporation, chartered by the laws of a particular State, having a known and defined line of transportation, may contract for the safe carriage and delivery of goods to a point beyond the terminus of his line, within or without the State; and if such a contract is made, all connecting lines stand in the relation of his agents, for whose defaults he is responsible to the owner of the goods.—*Hutchinson on Carriers*, § 145. When goods are consigned to a place on his own line of transportation, the known and established duty of a carrier is to deliver them at that place, and to the person who has the right to receive them. A mistake, however innocent, in making delivery, either to the proper person, or at the proper place, involves him in liability. When he accepts goods, directed to a place beyond the line of his route, not limiting his liability, what difference is there in the measure of his duty and liability? To assume that he is a carrier

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only to the terminus of his own route, and from thence a forwarder, is, as was said by Lord ABINGER, in *Muschamp's case*, to assume that the shipper and carrier enter into "a very elaborate kind of contract; it is, in substance, giving to the carriers a general power along the whole line of route, to make, at their pleasure, fresh contracts, which shall be binding upon the principal who employed them." Unless the shipper in person attends the goods, and enters into these new contracts, they are practically unilateral; and it is difficult to believe that any shipper ever intends assenting to a contract with the receiving carrier which involves such consequences. When, without a special contract, he intrusts his property to the receiving carrier, he understands that the duty and obligation of the carrier is to deliver safely at the point of destination. If that be beyond the line of the receiving carrier, he understands that the receiver must have some connection with other carriers, by whose agency the delivery is to be made. With these he has no connection or communication, nor can it be intended that he should have. When there is a failure to deliver, to compel the owner to pass the carrier with whom he contracted, to whom he made delivery, because it may be that there was no default on his part, and search through the entire line of transportation, until he finds the delinquent, seems to us inconsistent with the principles which underlie the whole doctrine upon which are founded the duty and liability of common carriers. As in this case, the line of the receiving carrier may cover but an insignificant part of the entire line of transportation, and before the point of destination is reached, numerous carriers must intervene; to compel the owner to pass the carrier with whom he first dealt, because he was guilty of no delinquency, and travel over the whole line until he finds who of the connecting carriers was in default, is to condemn him to almost certain loss. The true doctrine, that which is most consistent with all the principles which govern the liability and duty of carriers, and which seems to us required by the same necessity and public policy upon which these principles are founded, is, that a common carrier who receives goods destined for a place beyond his own line of transportation, not expressly otherwise limiting his duty and liability, must be regarded as contracting for a delivery at the point of destination. It can not be said this rule is more unjust to the carrier, than that which holds him liable as an *insurer*, for loss or injury not occurring by the act of God, or of the public enemy. Nor is it more unjust than the rule which compels him to receive all goods within the scope of his business, which are offered to him for transportation on his

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own line. The injustice seems to us to be visited upon the public, who are compelled to employ carriers, if the opposite rule is adopted.

Let the judgment of the Circuit Court be affirmed.

Lightfoot v. Jordan.

Detinue for Mule.

1. *Against whom action lies.*—Ordinarily, an action of detinue can only be maintained against the person who has possession of the chattel at the commencement of the suit; and it may, perhaps, be maintained against a person who has transferred the chattel to another, with intent to evade an action by the owner; yet, to a special plea denying the defendant's possession at the commencement of the suit, a replication averring that he was in possession a short time before the commencement of the suit, "and wrongfully parted with the possession after notice and demand by said plaintiff," does not bring the cause within this principle, and is demurrable.

APPEAL from the Circuit Court of Macon.
Tried before the Hon. JAMES E. COBB.

BREWER & BREWER, for appellant.

ABERCROMBIE, GRAHAM & BILBRO, *contra*.

MANNING, J.—Appellant brought an action of detinue against defendant, for a mule: to which *non detinet*, was pleaded, and also, specially, that defendant had not possession of the mule when the suit was brought. To which plaintiff replied, that "defendant was in possession of the property sued for in this suit, a short time before the bringing of the same, and that the said property was claimed and demanded of him by this plaintiff, as her property, and that after said notice and demand he wrongfully parted with the possession before the beginning of the suit." A demurrer to this replication was sustained, and this is assigned as error. The case was submitted as on briefs, but there is none with the record.

The action is brought to recover particular chattels in specie. Its gist is the wrongful detainer, and not the original taking.—1 Chit. Pl. 122-3. It is therefore maintainable, ordinarily, only against a person who has possession of the thing sued for. If this be parted with before judgment, or,

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being an animal, die, plaintiff is entitled to recover, as an alternative, the value of the thing, to be assessed by the jury. But the action should be brought against the person who then has possession when the suit is begun.—*Lindsey v. Perry*, 1 Ala. 264.

There might be a case, possibly, in which, if it be alleged and shown that the person sued has transferred the chattel claimed, with intent to evade an action against him for it, and to keep the property away from the owner, detainee perhaps would lie. But the replication in this record does not make such a case. Consistently with its allegations, defendant might have remained in possession of the mule months after the demand of plaintiff was made, and afterwards have disposed of the animal without any thought of plaintiff's claim of the same.

Whether this was done wrongfully or not, would depend on the facts of the case; and none are disclosed that support the legal conclusion alleged in the replication.

Let the judgment of the Circuit Court be affirmed.

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Ejectment.

1. *Statutory lien of contractors, mechanics, and material-men.*—The lien given by statute to contractors, mechanics, and material-men, for labor done and materials furnished in the construction of buildings, &c. (Code, §§ 3440-44), attaches from the commencement of the building, but is inchoate until the claim is filed in the office of the judge of probate; and if the claim is not so filed within the time prescribed by the statute, the lien is lost.

2. *Same.*—When a contractor undertakes to do the work on a building, or to furnish the materials and do the work, he acquires a lien under the statute, to the extent of his contract, from the commencement of the work; and when one person contracts to do the work, and another contracts to furnish the materials, the lien of each attaches when he begins the performance of his contract. But, when a contractor undertakes only to do the work, and the materials are to be furnished by the owner of the property, and after the commencement of the work materials are furnished by a third person, under a separate and independent contract with the owner, the lien of the material-man does not relate back to the commencement of the building, so as to override the lien of a mortgage or other intervening incumbrance.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. H. T. TOULMIN.

This action was brought by Ira W. Porter & Co., the appellees, to recover a lot in the city of Mobile, particularly

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described in the complaint; and was commenced on the 1st February, 1879. The summons and complaint were served on W. L. Eggleston, tenant in possession; and John Welch was admitted to defend as landlord. The lot in controversy had belonged to Charles S. Bickford, and both parties to the suit claimed title under him; the plaintiffs, under a statutory lien for materials furnished by them to aid in the construction of a house on the lot, a judgment enforcing the lien, and a sheriff's deed to themselves as the purchasers at a sale under execution on that judgment; and the defendant, under two mortgages executed to him by said Bickford, which were foreclosed under a power of sale therein contained, and a deed to him by the nominal purchaser at the mortgage sale.

It appeared from the evidence adduced on the trial, as set out in the bill of exceptions, that some time prior to October, 1876, Bickford made a contract with one Smith, a builder, for the erection of a house on the lot, and agreed to furnish all the materials, while Smith was to do the work; that Smith commenced work under this contract, in October, 1876, "and did a considerable amount of work on the house, including framing, roofing, weather-boarding, and most of the outside work; that he quit work in January, 1877, before the completion of the house, because Bickford was slow pay; and that he returned in May, 1877, after satisfactory arrangements about pay had been made with Bickford, and did the finishing work." The plaintiffs were hardware merchants in Mobile, and one of them testified, in their behalf, "that in April, 1877, Bickford came to their store, and said that he desired to get some articles to finish his house, then in process of construction, and desired more than thirty days' time, which was the time usually given in the trade; that witness agreed to furnish such articles, as they might be needed, and to give said Bickford sixty days on his purchase of said materials;" and that the articles were furnished, under this agreement, at the dates shown in the account which was exhibited, between April 3d and July 6th. For the articles so furnished, including some other similar articles "furnished in the usual course of trade" in January, 1877, plaintiffs filed their claim against Bickford, with the judge of probate of Mobile county, on the 24th October, 1877. On the 12th January, 1878, they commenced their action against Bickford, to enforce this claim; and on the 16th May, 1878, obtained a judgment for \$252.82, with a special direction for the levy of execution on the property specified. Under an execution issued on this judgment, the sheriff sold the property on the first Monday in September, 1878, and the plaintiffs became the purchasers; the sheriff's deed to them being

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dated the 6th September, 1878. This was the title shown by the plaintiffs.

The defendant offered in evidence a mortgage executed to him by said Charles S. Bickford and wife, dated the 27th February, 1877, which conveyed the lot in controversy, and purported to be given to secure the payment of \$810, due by several promissory notes of even date with the mortgage, and maturing at three, six, nine, twelve, and fifteen months after date; which mortgage was duly acknowledged and recorded on the day of its date. "The defendant introduced in evidence, also, a second mortgage on the same premises, and between the same parties, which was given to secure the sum of \$400, and which was duly executed, acknowledged and recorded in May, 1877. It was admitted that said Bickford failed to pay said mortgage debts; and that the first mortgage was regularly foreclosed, under the power of sale therein contained; and that a deed of said property was made by the mortgagor, on the 21st May, 1878, to John Elliott, who, on the following day, conveyed back to the defendant; and that the said defendant was thereupon let into the possession of the said premises by the said Bickford, and has ever since continued in possession of the same by himself and his tenants." This was the defendant's title.

On the trial, the plaintiffs first offered in evidence the proceedings in the suit for the enforcement of their lien, the execution on their judgment, and the sheriff's deed to themselves; and they here closed. The defendant then offered in evidence his mortgages and deed, as above stated; and the plaintiffs, in rebuttal, then offered the testimony showing when and how their claim or lien originated. Numerous exceptions were reserved by the defendant to the rulings of the court on questions of evidence, but the decision of this court renders it unnecessary to notice them.

"The court charged the jury, among other things, as follows: 'If the jury find, from the evidence, that the plaintiffs furnished materials for the building on the lot in controversy, under a contract with the owner (Bickford) made in April, 1877; and that a just and true account of their demand for the same was filed in the office of the probate judge, within four months after the indebtedness on such demand accrued; and that they brought suit on such demand, within ninety days thereafter, and prosecuted the same to judgment; and that the building, for which such materials were furnished, was commenced in October, 1876; and that the property described in said judgment was sold by the sheriff, under an execution issued on said judgment, and bought by the plaintiffs; and that it is the same property described in the sher-

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iff's deed to the plaintiffs, and described in their complaint in this case,—then the plaintiffs are entitled to recover.”

The defendant excepted to this charge, and he now assigns it as error, together with the other rulings of the court to which he reserved exceptions.

G. B. CLARK & F. B. CLARK, Jr., for appellant.—In ejectment, only legal titles can be considered. The defendant in this case was not only in possession, but he showed a perfect legal title in himself; that is, a mortgage from Bickford, through whom also the plaintiffs claim, a sale under the mortgage, and a conveyance from the purchaser at that sale. Against this perfect legal title, the plaintiffs set up a mechanics' lien, which is neither a title, nor evidence of title; neither a *jus ad rem*, nor a *jus in re*; but only a statutory right, to be enforced by a proceeding *in rem* in strict compliance with the terms of the statute. The sheriff's deed to plaintiffs, founded on their judgment against Bickford, was subsequent to the accrual of defendant's title; and there was no proof (nor could there be) that Bickford was in possession at the time of the levy and sale, or that he had any interest subject to be sold. As between the plaintiffs' deed from the sheriff and the defendant's title under the mortgage, the prior right and title were clearly with the defendant; and therefore the plaintiffs sought to supplement their title under the deed, by proof of their claim against Bickford, and of the proceedings to enforce it. As against the defendant to this suit, who was no party to that proceeding, the proceeding was *res inter alios acta*. By the express words of the statute giving the mechanics' lien, persons interested in the property, if not made parties, “shall not be bound by any such proceedings.” Bickford was the only defendant to the proceeding, and he had no interest in defending it, since the property was already heavily mortgaged. There is no question as to the validity of the defendant's mortgages; nor is any negligence, or want of good faith, imputed to him. He advanced his money on the faith of an unincumbered title, and his inquiries could only have discovered the facts actually existing—that is, that the erection of a house on the premises had been commenced, but the workman had abandoned the contract. With this contract the plaintiffs have no connection, and they can not set it up, in aid of their subsequent contract, to defeat the intervening rights of the defendant. The statute can not be wrested from its purpose, to effect such injustice.

THOS. H. PRICE, *contra*.—The “mechanics' lien law” is
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but a mode of securing the payment of a debt. Though the law is new in Alabama, it is by no means a novelty in other States. In its construction, it is proper to look to the judicial interpretation which similar laws have received elsewhere, in connection with the avowed object and purpose of the law itself, which is protection to the mechanic and material-man. This purpose can only be adequately effected by making his lien relate to the commencement of the work; and this is no injustice to the public, since the work itself is notice to all the world.—Phillips on Mechanics' Liens, §§ 215-19. This was clearly the intention of the legislature, and it is declared in unequivocal language: "The lien for the work or things aforesaid shall attach, and be preferred to all other incumbrances which may be attached to or upon such buildings, erections, or other improvements, or the ground, or either of them, *subsequent to the commencement of such buildings,*" &c.—Code, § 3442. The lien, however, is necessarily inchoate and imperfect, until recorded and established by a judicial proceeding; and the subsequent sections of the law make provision for this proceeding. The terms of the law are positive and unequivocal; the legislative power to pass such enactments is undoubted; and the construction contended for is supported by numerous judicial decisions. *Amer. Fire Ins. Co. v. Pringle*, 2 Serg. & R. 138; *Schaeffer v. Lobman*, 34 Mo. 68, and authorities cited by Phillips, *supra*. Neither interruptions in the work after its commencement, nor changes in the plan, so that the original character of the building is not entirely changed, affect the lien, or give a new commencement.—*Pennock v. Hoover*, 5 Rawle, 291; *Gordon v. Torrey*, 2 McCarter's Ch. N. J. 112. Of course, the defendant was not concluded by the plaintiffs' judgment, to which he was not a party; nor was it claimed to be conclusive on him. On the contrary, he was allowed every opportunity to attack it, and attempted to impeach it.

STONE, J.—The present case arises under the act "To establish and regulate liens of mechanics and other persons." approved March 6, 1876.—Pamph. Acts, 165; Code of 1876, §§ 3440 to 3461, inclusive. Section 3442 declares, that the lien conferred by the statute "shall attach, and be preferred to all other incumbrances which may be attached to or upon such buildings, erections, or other improvements, or the ground, or either of them, *subsequent to the commencement of such buildings or improvements.*" Section 3444 prescribes the time and manner in which such claim of lien shall be preferred—namely, by filing with the judge of probate "a just and true account of the demand due him, after

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all just credits have been given, which is [claimed] to be a lien upon such building or other improvements, or upon the unpaid balance in the owner's or proprietor's hands, and a true description of the property, or so near as to identify the same, upon which the lien is intended to apply; . . . which statement shall, in all cases, be verified by the oath of the claimant, or some other person having knowledge of the facts." The time limited for thus filing the claim with the judge of probate is six months after the indebtedness has accrued, if the claim be by the original contractor; thirty days, if by a journeyman or day laborer; and four months, if by any other person seeking to obtain the benefit of the provisions of the act. This section then proceeds to declare, that the "statement of account and description, when so filed, shall be a lien upon the building, or other improvements, with all the rights and privileges under this chapter, from and after such filing."

It will be observed that, under the first named of these sections, the lien given is *preferred* to all other incumbrances which may be *attached*, "subsequent to the commencement of such buildings or improvements." This language, if it stood alone, is simple and explicit, and would have no margin for construction. It fixes a definite time when the lien shall attach—the commencement of the building or improvement. Under the other, it is declared, that the "statement of account and description, when so filed, shall be a lien." This filing may be four or six months after the indebtedness has accrued, which will generally be at the completion of the building or improvement. Construed alone, this language would import that the lien does not attach until the claim is filed; for, *inclusio unius est exclusio alterius*. Such is the implication when language such as this, unexplained by anything precedent or subsequent, comes up for interpretation. But both the clauses we are commenting on are found in one and the same statute, enacted at one and the same time. It is our duty to harmonize these provisions, if we can, and to give to each word and sentence its due weight in arriving at the legislative will. If we hold that the language employed in section 3444 means that the lien does not attach until the claim is filed, we nullify the provision in section 3442, which gives a preferred lien from the commencement of the building or improvement. This, we think, we are forbidden to do. We feel it our duty to give to section 3442 the effect its language expresses, and hold that the lien attaches from the commencement of the building or improvement. This lien, however, is liable to be defeated and lost, if the claim be not verified and filed with the judge of pro-

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bate within the time prescribed by section 3444 of the Code. When so verified and filed, the lien becomes complete. Till then, it is inchoate and defeasible. This gives some operation to that part of section 3444 we have been commenting on, and is the best solution we can give of the apparent repugnancy in the two provisions of the statute.

2. The question remains, who are entitled to this preferred lien, which dates from the commencement of the building or improvement? We do not doubt that a contractor, who, by the terms of his contract, binds himself to do the labor, or to furnish the materials and do the labor, acquires a lien for both materials and labor, when he commences the work. As to what constitutes a commencement of work, see brief of appellee; also, Phillips on Mech. Liens, §§ 216 to 219, inclusive; *Pennock v. Hoover*, 5 Rawle, 291; *Fleming v. Bumgarner*, 29 Ind. 424; *Gordon v. Torrey*, 15 N. J. 112. Nor do we doubt that when, by the terms of the contract, one person is to do the labor, and another is to furnish the materials, the lien of each attaches from the time he commences the performance of his contract. As to the mechanic, this is unquestionably the rule; and it works no hardship to the person subsequently purchasing the property, or acquiring a lien on it. Commencement of the building is a patent fact, which all persons can see and know; and persons dealing in reference to such property are put on inquiry, and justly chargeable with knowledge of all that inquiry would lead to—namely, that there is, or may be, a mechanic's lien under the statute. Such is the argument in vindication of this whole field of legislation, and its moral equities. The legislature aimed at protection to a meritorious class of citizens, and did not intend to provide a snare that might entrap *bona fide* purchasers.

The record in this case informs us, that the contractor was to do the work, while Bickford, the owner of the lot and employer, was to furnish the materials. The building had been commenced, but was not completed. At this stage, Welch, the appellant, lent money to Bickford, and took a mortgage on the lot having the unfinished house on it. If Bickford was in arrears to the contractor, for work done, or to be done, under contract previously made, or to him or another for materials furnished, or to be furnished, under like prior contract partly executed, then Welch was not an innocent purchaser, but stood charged with notice of all information that inquiry would have led to. As to him and all others, the building was commenced. But, inasmuch as Porter & Co., the appellees, had, at that time, not only furnished no materials for the building, but had no contract for

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furnishing such materials, there was nothing to put Welch on inquiry as to their claim, and no inquiry could have led to the discovery of material information. Nothing existed to be discovered. If we were to hold that, because a building had been commenced, a subsequent contractor or material-man could acquire a lien, which would take precedence over an intervening incumbrance, we think we would shock the moral sense of the profession, and fail to carry out the intention of the legislature. Let us show, by an illustration, to what consequences such doctrine would lead. A mechanic commences a building, but, for some cause, fails to complete it. He has forfeited his claim for compensation, or has been paid, and has no claim which can support a lien. An incumbrance is then created on the property, by mortgage or otherwise. Subsequent to the creation of this incumbrance, another mechanic is employed to complete the work and finish the building. Will his lien date back to the commencement of the building by his predecessor, and thus be preferred to that of the intervening incumbrancer? We suppose no one would contend for such a result as this, and yet we can perceive no difference, in principle, between the claim of such subsequent contractor, and that of a material-man who furnishes materials under a contract made after the creation of the incumbrance.

In the case of *Soule & Page v. Dawes*, 7 Cal. 575, speaking of the liens of mechanics, the court said: "All persons who deal with the property, during the progress of the work, are charged with notice of the claim of the contractor. But if, after informing himself of the nature and amount of the contractor's claim, he takes a conveyance of the property subject to it, I know of no rule of law, and certainly no principle of equity, which enables the parties, by a subsequent contract, or by an alteration in the existing contract, to deprive him of the benefit of his purchase, by creating an incumbrance on the property, which was not contemplated in the original contract." This language is quoted, as part of the text, in *Phillips on Mechanics' Liens*, § 217. See, also, *Fleming v. Bumgarner*, 29 Ind. 424. On the questions we have been discussing, see *Gordon v. Torrey*, 15 N. J. Eq. 112; *Schaeffer v. Lobman*, 34 Mo. 68; *Crowell v. Gilmore*, 13 Cal. 54.

We feel no hesitation in declaring that, where a building or improvement is commenced under one contract, and materials are subsequently contracted to be furnished, and are furnished under a separate and independent contract, not embraced or provided for in the original agreement, the lien of the material-man does not attach from the actual com-

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mencement of the building or improvement, nor at any other time anterior to the contract under which the materials are furnished. This is decisive of this suit, as the facts clearly appear in the bill of exceptions. Instead of the charge given on the facts hypotheticated, the charge should have been that, on the facts in this case, as shown by the evidence, if believed, the defendant was entitled to a verdict.

The appellees, according to the evidence, are not without a lien. They have a lien on the property, "to the extent, and only to the extent, of all the right, title, and interest owned therein by the owner or proprietor of such building [Bickford] for whose immediate use or benefit the labor was done, or things furnished."—Code, § 3441. They have a lien, also, which the statute declares "shall attach to the building, erections, or improvements, only for which they were furnished, or the work was done, in preference to any prior lien, incumbrance, or mortgage upon the land upon which such buildings, erections, improvements, or machinery has been erected or put."—Section 3442. To what extent this latter lien attaches, whether to the whole structure, or only to the materials which were furnished, is a question not raised by this record, and we need not decide it. It has not been discussed, and we withhold our opinion until the question properly arises. We state other questions which may arise under this statute, merely for the purpose of announcing that they are not intended to be now decided. First, when, by the terms of the contract, the work and labor are performed by the contractor, and materials furnished by a material-man under an independent, original contract, does the lien of the latter attach when his contract to furnish is made and the contractor commences work under his contract, or does it attach only from the time he commences to furnish materials by actual delivery? Second, at what time, and to what extent, does the lien of a laborer, journeyman, employe or sub-contractor attach?

What we have said above renders a decision of all other questions unnecessary.

Reversed and remanded.

[Ex parte Acree.]

*Ex parte Acree.**Petition for Habeas Corpus.*

1. *Circumstantial evidence.*—A person charged with a felony should not be convicted on circumstantial evidence alone, unless it excludes to a moral certainty every reasonable hypothesis but that of his guilt: no matter how strong the circumstances may be, they do not come up to the full measure of proof which the law requires, if they can be reconciled with the theory that another person was the guilty agent.

2. *Right to bail in capital case.*—A prisoner, charged with a capital felony, being entitled to bail as a matter of right, before conviction, except "when the proof is evident, or the presumption great," should not be refused bail, when the evidence against him is entirely circumstantial, unless it excludes to a moral certainty every reasonable hypothesis but that of his guilt.

THE petitioner in this case was indicted, jointly with a negro woman, for the murder of an infant child a few days old, which had been killed and buried, and of which the woman was supposed to be the mother. After indictment found, the petitioner applied, by petition in proper form, to the Hon. A. J. FLETCHER, probate judge of Covington county, to be admitted to bail; and on all the evidence adduced at the hearing, bail being refused by the probate judge, he now renews his application to this court, annexing to his petition a certified copy of the evidence adduced and the proceedings had before the probate judge.

STONE, J.—The evidence against the petitioner is all circumstantial. It may present very suspicious circumstances, and point strongly to the accused as the guilty perpetrator, or participant in the perpetration. It is not our intention to weaken the force of these circumstances. The humane provisions of the law are, that a prisoner, charged with a felony, should not be convicted on circumstantial evidence, unless it shows by a full measure of proof that the defendant is guilty. Such proof is always insufficient, unless it excludes, to a moral certainty, every other reasonable hypothesis, but that of the guilt of the accused. No matter how strong the circumstances, if they can be reconciled with the theory that some other person may have done the act, then the defendant is not shown to be guilty, by that full measure of proof which the law requires. The constitutional provision on this subject declares, "That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the pre-

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sumption great."—Const., Art. 1, § 17. We think the defendant is entitled to bail.

The writs of *habeas corpus* and *certiorari* will be awarded, to bring the prisoner before this court, and also the proceedings had before Judge FLETCHER, unless counsel are content to apply to the judge below for the relief prayed for, and which we have shown the prisoner is entitled to. If granted by the probate judge, he will fix the amount of bail.

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Statutory Contest as to Right of Homestead Exemption.

1. *Homestead exemption: governed by what law.*—The extent and quantity of the homestead, which is exempt as against execution creditors, are governed by the law which was in force at the time the debt was contracted against which the right is claimed, and not by that which may be in force when the right is asserted.

2. *Same, in 1870.*—The extent and quantity of the homestead in 1870 was determined only by the provisions of the constitution of 1868, which fixed the quantity, in lands in the country, at eighty acres.

3. *Same, by tenant in common.*—A tenant in common may claim a homestead in lands owned and occupied by himself and others, but the area of the homestead is not enlarged on account of his partial interest in it: if he would only be entitled to claim eighty acres in lands owned entirely by him, he can only claim a homestead in that quantity of lands held and owned by him in common with others.

4. *Same; occupancy.*—Not only title, but actual occupancy also, as distinguished from constructive possession, is essential to the right of homestead: there must be an occupancy in fact, or a clearly defined intention of present residence and occupancy, delayed only by the time necessary to effect removal, or to complete needed repairs, or a dwelling-house in process of erection; and this intention must be shown by acts of preparation of a visible character, or by something equivalent thereto, before the lien of the creditor's execution has attached.

5. *Affidavit of exemption.*—An affidavit, in support of a claim of homestead exemption, must show that the premises were occupied as a homestead, or that there was a manifested intention and preparation to occupy, when the lien of the execution attached; and when the homestead is part of a larger tract of land, the particular portion claimed must be designated.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

This was a statutory contest as to the right to a homestead exemption in certain lands in said county of Montgomery, on which an execution had been levied in favor of Edward Blum against Henry C. Carter. The plaintiff's judgment against said Carter, on which the execution issued, was rendered on the 7th November, 1872; and it was founded on a promissory note, dated the 10th February, 1870, and payable at a date

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not shown by the record. The execution on this judgment, which was levied on the lands, was issued on the 18th April, 1877. After the levy of the execution, the defendant claimed a homestead exemption in the lands, and made the affidavit prescribed by the statute; and the plaintiff thereupon made a counter affidavit, denying the right of exemption as claimed, and an issue was made up between the parties, in accordance with the provisions of the statute. On the trial of this issue, as the bill of exceptions recites, "the evidence was substantially as follows: The land originally belonged to the defendant's father, and, after his death, was assigned to his widow, who was defendant's mother, as a homestead. The time of her death was not proved. After her death, the title vested in two adults, the defendant, witness, and one minor. At the time of the levy of the execution, the defendant and the other adult were in possession of the land. At some time before the levy, and after the death of their mother, several cabins were erected on the land by witness and the defendant, for the accommodation of laborers on the land, who might occupy the same. No dwelling-house had ever been on said land, and it had never been occupied by defendant as a dwelling-place; but he lived in a rented house, on rented land, two hundred and fifty, or three hundred yards, from the land in dispute. Some time before the levy of the execution, the defendant hauled some lumber on said land, and stated at the time of the hauling, according to the evidence of a witness, that he intended to erect a dwelling-house for his family on said land, and was hauling in lumber for that purpose. The plaintiff objected to said evidence, because it was illegal and irrelevant; but the court overruled the objection, and plaintiff excepted. There was no evidence as to the time when said lumber was hauled, or as to the character or quality thereof. This being all the evidence, the court charged the jury, that to entitle a party to hold a homestead exempt from execution, he must occupy it as a homestead: that if, at the time of the levy of the execution, the defendant was cultivating the land, and his hired hands were living on it, and he had hauled lumber on it, and was preparing to build a residence on it, and was proceeding to do so in a reasonable time, intending it as a residence for his family, and to occupy it as a homestead,—that would be such an occupancy as was required by law to constitute it a homestead exempt from execution." The plaintiff excepted to this charge, and requested the court, in writing, to instruct the jury as follows: "If the jury believe, from the evidence, that there never was a dwelling-house on said land, owned and occupied by the defendant, then the defendant can not

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claim the property as exempt." Also, "that the jury, if they believe the evidence, must find for the plaintiff." The court refused each of these charges, and the plaintiff excepted to their refusal. The errors assigned are, the charge given by the court, the refusal of the charges asked, and several rulings of the court preliminary to the formation of the issue, which require no notice.

SAYRE & GRAVES, for the appellant.

D. S. TROY, *contra*.

STONE, J.—The debt, against which the homestead right of Carter is asserted in this case, was contracted in 1870. At that time, only the provisions of the constitution of 1868 operated on the question of the extent and quantity of the homestead exemption. The quantity, if not in a city, town, or village, was fixed at eighty acres. We have uniformly held, that the law in force at the time the debt is contracted, must determine the extent and value of the homestead, and not the law in force, if different, when the exemption is claimed.—*Watts v. Burnett*, 56 Ala. 340; *Wilson v. Brown*, 58 Ala. 62, and authorities there cited; 60 Ala. 302.

It is one of the uncontroverted facts in this case, that Carter, the appellee, was and is one of three tenants in common, holding and owning, as such, three hundred and thirty-three acres of land; the interest of each being one undivided third, equal to one hundred and eleven acres. In *McGuire v. Van Pel*, 55 Ala. 340, we decided, that the owner and occupant of a homestead, although a tenant in common with others, and therefore having only an undivided partial interest in the premises, is nevertheless entitled to homestead exemption. We held, however, that "the area of the exemption is not enlarged, to compensate for defects of title, or fractions of ownership. Such interest, and such only, as the owner has in the given quantity exempted, is reserved for the use of the family; and the owner and his family are permitted to retain and occupy it as it is, and only as it is." Applying this principle to the present case, Carter could only retain, as homestead exemption, his undivided third part of the eighty acres provided for in the constitution. He could not claim his undivided one-third part in two hundred and forty acres, so as to give him the equivalent of eighty acres in fee, or severalty. This would be to enlarge the area of the exemption, to compensate for fractions of ownership.

Occupancy is an indispensable element in every valid claim of homestead. Title and possession may both be com-

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plete in law—such possession as will maintain trespass *quare clausum fregit*; and yet, if the premises be not actually occupied—a *pedis possessio*, as the law phrases it—the claim is not good under the constitution of 1868. Owned and occupied, are essential conditions.—*McConnaughy v. Baxter*, 55 Ala. 379. “Unless devoted to use and occupancy as a home, a dwelling place, protection is not extended to it. It is because of its use and occupancy as a home—to secure and preserve it as such—that exemption from sale under judicial process is granted.”—*Ib.*; *Dexter v. Strobach*, 56 Ala. 233. Speaking of Lord COKE’s definition, Thompson, in his work on Homesteads, says: “The homestead means the home place—the place where the home is; and such is its legal acceptance at the present day. It is the home—the house and the adjoining land, where the head of the family dwells—the home farm. It is the land where is situated the dwelling of the owner and his family. A homestead necessarily includes the idea of a residence. It must be the owner’s place of residence—the place where he lives.”—Section 100. “The nature of the *occupancy*, by which land may be impressed with the homestead character, should be carefully distinguished from *possession*, such as may be sufficient to serve as evidence or notice of title in the possessor. The latter may be *constructive*, while the former should in every instance be *actual*—in the sense that it should not depend upon paper evidence, the mere erection of improvements, the payment of taxes, or the exercise of personal control over the property to be affected.”—*Ib.* § 241.

A question is raised in this case, whether an intention to occupy, and preparation therefor, are the equivalent of actual occupancy. In cases of change of homestead from one place to another, or of purchase of a place for a homestead, some interval of time must elapse before there can be an actual occupancy of the new homestead. In the case of *Brown v. Martin*, 4 Bush, 47, the Kentucky statute exempting the homestead was construed. The language of their statute of exemption is, “so much land, including the dwelling-house and appurtenances owned by the debtor, as shall not exceed in value one thousand dollars.” Nothing said about occupancy, except what may be inferred by the word *dwelling-house*. The court said, “The right of exemption depends upon the present and actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for himself and family.”

The case of *Neal v. Coe*, 35 Iowa, 407, presented the case of a change of residence of the debtor; and, consequently, the inquiry whether an intention to occupy was equivalent to

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occupancy, and how that intention should be manifested. The defendant had removed and placed part of his furniture in the newly purchased residence, and the residue had been removed from the old homestead; and it, together with himself and family, were only awaiting necessary repairs that were being made, preparatory to taking possession of the newly acquired house as a residence. They had left the former home, and were boarding temporarily near the newly purchased premises. The court said: "While the intention is not alone sufficient to impress the homestead character, yet it may be considered in connection with the circumstances. Some time usually intervenes after the purchase of property before it can be actually occupied. Even after the process of moving begins, it frequently takes days before the furniture can be arranged, and the house placed in comfortable position for actual occupancy. Under such circumstances, great inconvenience might arise, if the homestead character was made to depend upon the actual, personal presence of the members of the family. Law is entitled to, and can command respect, only when it is reasonable, and adapted to the ordinary conduct of human affairs. In this case, the house in question was used by defendants for holding a portion of their furniture on the 15th of March. On the 1st of April, the family came, expecting to possess it; but the repairs not being completed, they did not actually sleep and eat in it, until twelve weeks thereafter. In the meantime, the repairs were progressing, and the furniture was unpacked and left there as it arrived. The plaintiff had knowledge of this possession, and of the intention of defendants to fully occupy the premises as a home, as soon as they were made fit. Under these circumstances, it seems to us the court did not err in holding it exempt from liability for plaintiff's judgment."

In the case of *Grozholz v. Newman*, 21 Wallace, 481, a question arose as to the power of a husband to convey title to a lot in Austin, Texas, without the concurrence of the wife. The constitution of Texas ordained, that the owner of a homestead, if a married man, shall not be at liberty to alienate the same unless by the consent of the wife. The court said: "It is admitted that the deed was good, if the lots described in it were not, in fact, a part of the homestead at the time of its execution. It rests upon the complainants, therefore, to prove that they were. To do this, it must be made to appear that they were actually used, or manifestly intended to be used, as part of the home of the family. . . . A secret intention of the seller, not made known, can not affect a purchaser. Unless the purchaser knew, or from the cir-

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cumstances ought to have known, that the lots were a part of the homestead, he had the right to treat with, and purchase from the husband, without the concurrence of his wife."

In *Coolidge v. Wells*, 20 Mich. 80, it was decided, that "land on which no dwelling-house had ever been erected or commenced, and on which the complainant nor his family had ever resided, is not exempted as a homestead." See, also, *Dean v. Scott*, 37 Tex. 59. In *True v. Morrill*, 28 Vermont, 672, it was ruled, that "land which has a dwelling-house upon it, occupied by a tenant, but upon which the owner never resided, can not be treated as his homestead, though he had no other dwelling-house, and may have contemplated living on the premises at a future time." It was declared in *Fogg v. Fogg*, 40 N. H. 282, that the homestead right attached under the following state of facts: "While the debtor was in the act of moving into his dwelling-house, with a design to occupy it as the family homestead, and having no other real estate, the plaintiff, his creditor, attached it upon mesne process, and the debtor completed the moving in on the next day, and ever afterwards, up to the trial, occupied it as the family residence."

Guided by these principles, we hold that, to constitute a valid claim of homestead, there must be an occupancy in fact, or a clearly defined intention of present residence and actual occupation, delayed only by the time necessary to effect removal, or to complete needed repairs, or a dwelling-house in process of construction. An undefined, floating intention to build or occupy at some future time, is not enough. And this intention must not be a secret, uncommunicated purpose. It must be shown by acts of preparation of visible character, or by something equivalent to this.—*Daniel v. Collins*, 57 Ala. 625; *Boyle v. Shulman*, 59 Ala. 566; *Preiss v. Campbell*, *Id.* 635; *Chambers v. McPhail*, 55 Ala. 367.

The present record does not inform us when the lien of the plaintiff attached, by the delivery of execution to the sheriff. To prevail over the execution claim, the occupancy, or manifested intention and preparation to occupy, must have preceded the time when the lien attached. Homestead claim can not override prior liens, whether given by law, or created by contract. We refer, of course, to liens, whose vitality has been preserved.—*Preiss v. Campbell*, 59 Ala. 635. The affidavit of claim in the present case is fatally defective, in several respects. It does not set forth that the premises were occupied as a homestead, when the lien of the execution attached, nor does it show a state of facts to bring it within the rule above declared. The tract of land contains three hundred and thirty-three acres, and the affidavit fails

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to select or designate eighty acres, in which the homestead is claimed. The motion to quash the affidavit of claim ought to have been sustained.

We consider it unnecessary to notice the other rulings, as what we have said will furnish a sufficient guide on another trial.

Reversed and remanded.

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Bill in Equity to Enforce Vendor's Lien on Land.

1. *Service of process on infants.*—When infants are joined with their father, as defendants to a bill in chancery, the rule of practice (No. 23) requires that the service of process shall be made upon their father, for them, whether they be under or over fourteen years of age; and the service of process upon them personally, being unauthorized, is not sufficient to bring them into court.

2. *Appointment of guardian ad litem for infant.*—Until infants are properly brought into court, by the service of process according to the rules of practice, the appointment of a guardian *ad litem* for them is irregular, unauthorized, and not sufficient to support a decree against them.

3. *Attorney; appointment of, and appearance by.*—An infant can not appoint an attorney; hence, when an infant defendant to a bill has not been properly brought in as a party, pleadings signed by an attorney, though purporting to act as “solicitor for all the defendants,” do not bring the infant into court, nor amount to an appearance by him.

APPEAL from the Chancery Court of Chambers.

Heard before the Hon. N. S. GRAHAM.

C. D. HUDSON, MAY & McCRAW, and GEO. W. GUNN, for the appellants.

E. G. RICHARDS, *contra*.

MANNING, J.—The bill in this cause was filed by Atkinson, the appellee, to establish a vendor's equitable lien. Four of the defendants were minors, sued as heirs of their deceased mother; and according to the allegations, two were over and two under the age of fourteen years. Their father, Marcellus E. McIntosh, was living, and was sued as a co-defendant with them; and it is not alleged, nor does it in any way appear, that his interest in the subject of the suit was adverse to theirs. In these circumstances, the 23d rule of practice in the Courts of Chancery required, that service of process to make the minors parties defendant, whether over or

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under fourteen years of age, should be made upon the father. But, in respect of the two elder of the minors, this was not done. The process to bring them in was served upon them personally. This was "unauthorized, and was not sufficient to bring them before the court."—*Strange, adm'r, v. Rogers et al.*, in MS.; *Hodges v. Wise*, 16 Ala. 509. The sheriff's return shows, that the summons was executed by serving a copy on the father, "both personally, and as administrator, and also as parent" of the two minors under fourteen years of age; but, as to the other two minors, copies were served on them, personally. According to the decisions, they were, therefore, not so made parties as to be bound by a decree against them, upon an appeal from it to this court. See, also, *Sanders v. Godley*, 23 Ala. 473; *Clark v. Gilmer*, 28 Ala. 265.

Until brought into court, guardians *ad litem* could not properly be appointed for the minors. Such an appointment, if made, "being irregular, the subsequent proceedings and decree, by which infants are divested of title to land, cannot be sustained."—*Clark v. Gilmer*, 28 Ala. 266; *Bondurant v. Sibley's Heirs*, 37 Ala. 365.

In the transcript appears a notice, dated two days after the service of the subpoena, or summons, from the register to one Bragaw, informing him "that, by an order of the Chancery Court," in which the cause was pending, he had been appointed "guardian *ad litem* to protect the interest" of all the minor defendants; which he, in writing, at the foot of the notice, consents to do. But the record does not show any such order of appointment; nor does it appear that Bragaw did, in fact, ever file any answer, or do any other act, or procure any to be done, as guardian *ad litem*, in the cause, for the benefit of the minors. They were not, therefore, defended according to law at all.

These irregularities were, doubtless, overlooked in the Chancery Court, because solicitors for the adult defendants (selected probably by the father of the minors), in defending them, both really and professedly defended the minors also. The demurrers and answer to the bill both begin with the words, "and now come all the defendants," &c. But these pleadings were signed by the solicitors only, and were not, and did not purport to be, filed at the instance, or by authority of any one as guardian. And "it is well settled, that an infant cannot appoint an attorney. . . . 'It is,' says Chancellor KENT, 'against the course and order of the court, to permit the infant to act by solicitor, and not conducive to the rights of the parties. Infants should act under the advice and discretion of their next friend, or guardian; and the

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opposite party has, in such case, a responsible party for costs.' Infants are not supposed to be able to act with discretion."—*Cook v. Adams*, 27 Ala. 295.

For the errors indicated, the decree must be reversed, and the cause be remanded.

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Trial of Right of Property in Boxes of Tobacco.

1. *Right of stoppage in transitu*—The seller of goods may stop them *in transitu*, on account of the insolvency of the purchaser, not only when such insolvency occurred after the sale, but also when, though existing before, it was not discovered until after the sale.

2. *Same; when lost*.—The right of stoppage by the seller is lost, when, before it is exercised, the purchaser has sold the goods, and indorsed the bill of lading, to a sub-purchaser for value in good faith.

3. *Same; evidence of want of good faith by sub-purchaser*.—That the sub-purchaser, when he took a transfer of the bill of lading for the goods, had knowledge of the original purchaser's insolvency, is a fact tending to show that he did not purchase in good faith, and is admissible for that purpose in a contest with the original vendor.

4. *Statements of party as witness in another suit*.—Statements made by a witness while testifying, relative to a material matter in issue in another suit to which he is a party, as showing his knowledge of the insolvency of another person, may be proved against him in that suit without calling him as a witness.

5. *Proof of insolvency*.—Judgments confessed by the original purchaser, before the goods have reached their destination, and executions levied on his property the day after their rendition, tend to prove his insolvency, and are admissible evidence for that purpose.

6. *Who is purchaser for valuable consideration*.—The transfer of the bill of lading by the purchaser of the goods, as collateral security for a pre-existing debt, without any new consideration, does not constitute the assignee a purchaser for valuable consideration.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. J. Q. SMITH.

This was a statutory trial of the right of property in twenty-five boxes of tobacco, between J. M. Peters & Brother, of Virginia, as plaintiffs, and J. Loeb & Brother, of Montgomery, as claimants. The plaintiffs had sold the tobacco to M. Munter & Brother, of Montgomery, and, in the exercise of the right of stoppage *in transitu*, had claimed and demanded them of the carrier, the South & North Alabama Railroad Company, in whose possession the boxes were, and brought an action of detinue to recover them. Loeb & Brother, claiming under a purchase from Munter & Brother, interposed a claim to the tobacco, made the necessary affidavit,

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and gave bond for the trial of the right of property; and an issue was thereupon made up between them and the plaintiffs, as the statute directs. The facts are thus stated in the bill of exceptions:

"The plaintiffs resided in Liberty, Virginia, and Munter & Brother in Montgomery, Alabama. On or about December 13th, 1878, by order of Munter & Brother, plaintiffs shipped to them twenty-five boxes of tobacco, sold by them to said Munter & Brother; and on that day a bill of lading for said tobacco was issued by a railroad company, and sent to Munter & Brother at Montgomery. The proof was, that on the 17th December, 1878, five days before the arrival of the tobacco, Munter & Brother sold it to Loeb & Brother, the claimants, and at the same time transferred to them in writing the said bill of lading; and the only consideration of said sale and transfer was a debt, which was then, and had been for some time, due to said Loeb & Brother by said Munter & Brother, and which was credited with the price at which the tobacco was sold. After said sale, and before the delivery of the tobacco to the claimants, or to the consignees, to-wit: on the morning of December 23, 1878, plaintiffs gave notice to the South & North Alabama Railroad Company, the common carrier in whose possession the tobacco was, not to deliver it to the consignees, on the ground that the purchase-money had not been paid, and said Munter & Brother, the consignees, were insolvent. In said notice, plaintiffs tendered to said common carrier the freight due on said tobacco, and demanded the same; which demand being refused by the said carrier, the plaintiffs thereupon brought suit, and the said tobacco was seized under a writ in detinue, on said 23d December, 1878, by the sheriff of Montgomery county, while it was still in the possession of the said carrier, and before any delivery thereof; and thereupon Loeb & Brother interposed a claim under the statute. It was admitted that the plaintiffs had never been paid anything for the tobacco; and there was proof tending to show that said Munter & Brother were insolvent when said tobacco was bought by them, and continued so to be, and were insolvent when said notice was given to the carrier, and when the tobacco was seized; and that the claimants knew, or ought to have known these facts, when they purchased said tobacco. It was proved that said Munter & Brother, two days after the sale of said tobacco, on the 19th December, 1878, confessed judgments in the Circuit Court of Montgomery, in favor of Lehman, Durr & Co., for \$4,850, and in favor of another creditor for more than \$2,000; and M. Munter, one of said firm, swore that said judgments were confessed in order to give said

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creditors a preference. It was in proof, also, that said Munter & Brother's stock in trade was levied on by the sheriff of Montgomery county on the 20th December, 1878, and their store closed. To admission of which evidence claimants objected, but the evidence was admitted; and they excepted.

"In another case, in which Loeb & Brother were defendants, and other parties were plaintiffs, involving other and different matters, with which plaintiffs in this case had no concern, but involving a transaction between claimants and said Munter & Brother, one of the claimants in this case, who was one of the defendants in the case referred to, was examined as a witness; and on this trial, a witness was asked, what said claimant swore to on that trial. The claimants objected to this question, because it was illegal, and because it was irrelevant, and because no predicate had been laid to authorize such question. But, after plaintiffs' counsel had stated, that he expected to prove by said witness that said claimant had sworn to facts on that trial, which showed, or tended to show, that said Loeb & Brother had notice of the insolvency of Munter & Brother at the time of the purchase of said tobacco, the court allowed the question to be asked; and to this action of the court the claimants excepted."

"The court gave a general charge to the jury, to which no exception was taken by claimants; and by the request of the plaintiffs, in writing, instructed the jury as follows: 1. 'In order to constitute Loeb & Brother purchasers in good faith of the tobacco in controversy, they must have bought it without knowledge, either actual or constructive, of the insolvency of Munter & Brother; and if, at the time they purchased, they knew that Munter & Brother were insolvent, or the circumstances known to them were such as ought reasonably to have excited their suspicions, and led them to inquire, then they are not purchasers in good faith, within the meaning of the law.' 2. 'It is not necessary in this case, in order to defeat the claim of Loeb & Brother, that the proof should show that they had actual knowledge of the insolvency of Munter & Brother at the time of their purchase; but it is sufficient to prove that the circumstances known to them were such as ought reasonably to have excited their suspicions, and led them to inquire as to the solvency of Munter & Brother.' 3. 'In order to entitle Loeb & Brother to the tobacco in controversy, they must be purchasers for value, and also without notice, actual or constructive, of Munter & Brother's insolvency.' And to each of said charges the claimants duly excepted."

The charges given to the jury, and the rulings of the court

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on the evidence, to which, as above stated, exceptions were reserved, are now assigned as error.

SAYRE & GRAVES, for appellants.—1. The court erred in allowing a witness to prove what one of the claimants swore on a former trial, between Loeb & Brother and other parties. Loeb was a competent witness; and if the evidence was legal, he ought to have been questioned as to his former testimony, and allowed an opportunity to explain what he did say. A witness can not be impeached by proof of former statements or declarations, without first giving him an opportunity to explain. But the testimony itself was illegal. The case was between different parties, and it was not shown what the issues were. The question was improper in form, and called for all the supposed testimony, without regard to its relevancy; and the statement of counsel, as to the legal conclusion he expected to draw from it, does not relieve it of objection.

2. The court erred, also, in admitting evidence of the confessed judgments, and of the levy of executions on the stock of goods of Munter & Brother. If knowledge of insolvency renders void a sale of goods *in transitu*, such knowledge must exist at the time of the purchase. The fact that Munter & Brother confessed judgments after the sale, while it may conduce to show that they were insolvent two days before, when the sale was made, certainly does not tend to show that Loeb & Brother knew it.

3. The charges given, to which exceptions were reserved, are erroneous. They make the validity of the purchase by Loeb & Brother depend upon their knowledge of the insolvency of Munter & Brother; while the true test is, that the purchase is void as against the consignor, when its object is to assist the consignee in avoiding payment to him.—*Cumming v. Brown*, 8 East, 513; *Lee v. Kimball*, 49 Maine, 174; *Crawford v. Kirksey*, 55 Ala. 293. There is no evidence whatever that Loeb & Brother had any knowledge that the tobacco was not paid for, or even had any reason to suppose that it was not paid for. Possession of the bill of lading is *prima facie* evidence of title, and the question is never asked whether the holder has paid for the goods. This is the common practice in the commercial world, as the court judicially knows, and thousands of similar transactions occur every day. That the consignee of the goods is largely indebted, is no evidence that he does not intend to pay his debts. Many men are engaged in business, whose credit is beyond question, and who pay their debts with punctuality, while they are beyond the reach of legal process.—*Winslow v. Norton*, 29 Maine, 421. When the purchaser is insolvent

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at the time of the sale, as the evidence here tended to show was the fact, the seller takes the risk upon himself, and can not afterwards assert the right of stoppage *in transitu*.—*Rogers v. Thomas*, 20 Conn. 53.

L. A. SHAVER, *contra*.—1. The right of stoppage *in transitu* can only be defeated by a transfer of the bill of lading to a *bona fide* purchaser for value.—Benjamin on Sales, 2d ed., 719-20; Waite's Actions and Defenses, vol. 5, p. 616, and authorities there cited.

2. A purchaser for valuable consideration is one who, at the time, parts with something of value—that is, advances a new consideration, surrenders some security, or does some other act which, if the purchase were set aside, would leave him in a worse position than he was before.—Bigelow on Fraud, 309-10; *Wells v. Morrow*, 38 Ala. 125; *Lesassier v. The Southwestern*, 2 Woods, C. C. 35; *Rodgers v. D'Escompte*, Law Rep. 2 P. C. 393; *Harris v. Pratt*, 17 N. Y. 249; Benjamin on Sales, 2d ed., 689, 723. The proof is conclusive that the claimants are not purchasers for value, as defined by these authorities; and there is no conflict in the evidence on this point. Not being such purchasers, they were not entitled to recover, and were not injured by any of the adverse rulings of the court, even if erroneous.

3. Nor were they *bona fide* purchasers, if, at the time of their purchase, they had knowledge of the insolvency of Munter & Brother, or of any facts sufficient to put them on inquiry.—*Wright v. Campbell*, 4 Burr. 2046; Benjamin on Sales, 723; 4 Camp. 31; *Pringle v. Phillips*, 5 Sandf. 157.

4. The right of stoppage *in transitu* extends to all cases of insolvency, "whether existing at the time of the sale, or occurring at any time before the actual delivery of the goods." Waite's Actions and Defenses, vol. 5, p. 613, and authorities there cited.

5. There was no attempt to impeach the witness Loeb. The issue was, knowledge of insolvency *vel non*; and the evidence was relevant to that issue. The other exception to the admission of evidence—"to which evidence claimants objected"—is too general and indefinite, and embraces evidence which is unobjectionable; and if any part of it was admissible, there was no error in overruling the objection.

MANNING, J.—Munter & Brother, being largely in debt, and insolvent, by an order requesting shipment to them, bought of plaintiffs, J. M. Peters & Brother, of Virginia, twenty-five boxes of tobacco; which they accordingly sent

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as directed, to Munter & Brother, at Montgomery, Alabama, by railroad, forwarding to them by mail a bill of lading therefor. On receipt of this, several days before the boxes arrived, Munter & Brother indorsed it, and transferred their right to the goods to J. Loeb & Brother, who gave them credit for the same, on a debt past due, which Munter & Brother owed them. There was no other consideration for this transfer. Soon afterwards, Peters & Brother, being informed of the insolvency of Munter & Brother, and claiming the right to stop the tobacco *in transitu*, demanded it of the carrier, the South & North Alabama Railroad Company, and sued the same in detinue for it, having first offered to pay the freight money. Loeb & Brother intervened as claimants, and thereby obtained possession of the goods. Whereupon, the suit was prosecuted against them, to a verdict and judgment in favor of Peters & Brother, from which Loeb & Brother have appealed to this court.

We do not concur in the opinion expressed in *Rogers v. Thomas* (20 Conn. 54), that a vendor of goods, in transit to an insolvent vendee, can not stop them on the way, before delivery, unless the insolvency of the vendee occurred after the sale to him of the goods. We think, with the Supreme Court of Ohio, that the vendor may stop the goods upon a subsequent discovery of insolvency existing at the time of the sale, as well as upon a subsequent insolvency. If there be a want of ability to pay, it can make no difference, in justice or good sense, whether it was produced by causes, or shown by acts, at a period before or after the sale.—*Benedict v. Schuettie*, 12 Ohio St. 515; *Reynolds v. Boston & M. R. R. Co.*, 43 N. H. 589; *O'Brien v. Norris*, 16 Md. 122; *Blum v. Marks*, 21 La. Ann. 268. The best definition of the right which we have seen, is that in Parsons's Mercantile Law, as follows: "A seller, who has sent goods to a buyer at a distance, and, after sending them, finds that the buyer is insolvent, may stop the goods at any time before they reach the buyer. His right to do this is called the right of stoppage *in transitu*."—Chap X, p. 60.

If, before this right is exercised, the buyer sells the goods, and indorses the bill of lading for them to a purchaser in good faith, and for value, the right of the first vendor to retake them is extinguished.—*Lickbarron v. Mason*, 1 Smith's Lead. Cases, 388. Evidence, therefore, that Loeb & Brother knew, when they took a transfer of the bill of lading, that Munter & Brother were insolvent, was relevant and proper to show, in connection with other testimony, that Loeb & Brother were not *bona fide* purchasers. And there was no error in permitting a witness to testify what one of that firm had

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previously said, tending to show such knowledge, when he was giving evidence in another cause. Statements and declarations, relevant to the matter in hand, which have been made by a party to a cause, may be proved against him, without his adversary being compelled to use such party as a witness in a suit in which he is interested.

The two judgments against Munter & Brother, in favor of creditors, confessed by the former before the tobacco had reached its destination, and the seizure upon execution the next day of property of Munter & Brother, by the sheriff, tended to prove their insolvency; and the evidence of those facts was, therefore, properly admitted.

The transfer of a bill of lading, as a collateral to previous obligations, without anything advanced, given up, or lost on the part of the transferee, does not constitute such an assignment as will preclude the vendor from exercising the right of stoppage *in transitu*. Said BRADLEY, Circuit Justice, in *Lesassier v. The Southwestern*, 2 Woods, 35: "Nothing short of a *bona fide* sale of the goods for value, or the possession of them by the vendee, can defeat the vendor's right of stoppage *in transitu*; and hence it has been held, that an assignee in trust for creditors of the insolvent vendee is not a purchaser for value, and, consequently, takes subject to the exercise of any right of stoppage *in transitu* which may exist against the assignor.—*Harris v. Pratt*, 17 N. Y. 249." Wherefore, it was held in the latter case, that an attachment in the suit of the vendee's creditor, of goods landed by the carrier upon a wharf-boat at the place of delivery, did not prevent the vendor from stopping them *in transitu*.—See, also, *O'Brien v. Norris*, 16 Md. 122; *Naylor v. Dennie*, 8 Pick. 199; *Nicholas v. Lefeuve*, 2 Bingh. (N. C.) 83. The doctrine is based upon the plain reason of justice and equity, enunciated in *D'Aquila v. Lambert* (2 Eden's Ch. 77), that "one man's property should not be applied to the payment of another man's debt." The right itself is regarded as an extension merely of the lien for the price, which the seller of goods has on them while remaining in his possession; which lien the courts will not permit to be superseded, before the vendee, who has become insolvent, obtains possession, unless, in the meantime, the goods have been sold to a person who, in good faith, has paid value for them, and so would be a loser *by his purchase*, if that were held invalid. Appellants having only credited Munter & Brother on a debt previously due from them, with the price of the tobacco, have nothing more to do, in order to get even, than to *debit* them with the same sum, for the non-delivery of the goods in consequence of the defect in Munter & Brother's title.

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The case of *Crawford v. Kirksey* (55 Ala. 282), so much relied on by appellants, is wholly unlike this. The question of stoppage *in transitu* was in no way involved in it. The controversy there was, whether a conveyance by a debtor in a failing condition, of property which was indisputably and entirely his, in payment of a debt to one of his creditors, was not void as to the others; and this court decided, that the law permitted such a preference, and that the transaction was not fraudulent in fact.

It results from what we have said, that there was no error in the charges to the jury.

Let the judgment of the Circuit Court be affirmed.

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Statutory Action in Nature of Ejectment.

1. *Abatement and revivor of action.*—By statutory provision (Code, § 2908), no civil action abates by the death or other disability of a party, plaintiff or defendant, when the cause of action survives; but the action may be revived, on motion, within eighteen months after the occurrence of the disability.

2. *Same, in ejectment, or statutory action.*—In ejectment, or the corresponding statutory action, if the sole plaintiff dies, or if one of several plaintiffs dies, the revivor may be in the name of his personal representative alone, or in the names of his heirs or devisees, or in the names of both the personal representative and the heirs or devisees, to be determined by the extent of the recovery sought—whether the land only, or also damages accruing prior and subsequent to the death of the original plaintiff.

3. *Limitation of revivor; amendment of complaint.*—In whatever form the revivor is sought, it must be made, or a motion to revive must be entered, within eighteen months after the death of the party; and if not made within that time, the action abates as to the interest of the deceased; and the defect can not be afterwards cured by an amendment of the complaint, bringing in the parties on whom that interest has devolved.

4. *When simple-contract creditor may come into equity.*—A court of equity, in the exercise of its original jurisdiction, would not interfere at the instance of a creditor by simple contract only, to set aside a deed fraudulent as to creditors, or to subject property fraudulently conveyed by the debtor; but this rule is now changed by the statute (Code, § 3886), which provides that “a creditor without a lien may file a bill in chancery to subject to the payment of his debt any property which has been fraudulently transferred, or attempted to be fraudulently conveyed by his debtor.”

5. *Lien under creditor's bill.*—On the filing of such a bill by a simple-contract creditor, he acquires a lien on the property which he seeks to reach and condemn, at least from the service of process; and if the suit is prosecuted to a final decree without laches, this lien will prevail against a purchaser from either the debtor or his grantee pending the suit.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. GEO. H. CRAIG.

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This action was brought by Geo. Riser, William A. Welch, A. D. Bell, M. L. Wilson, and Martha Pope, against William J. Evans and several other persons, who were his tenants, to recover a certain tract of land in said county, with damages for its detention; and was commenced on the 3d February, 1874. The lands had belonged to George C. Player, and both parties claimed under him, by conveyances as follows: the plaintiffs, under a purchase by them at a sale made by the register in chancery, pursuant to a decree rendered by the Chancery Court of Talladega at its August term, 1871, in a suit to which said George C. Player was a party defendant, hereinafter more particularly described; and the defendant Evans, under a purchase at sheriff's sale under execution against said Player, made on the first Monday in October, 1870. This execution was issued on the 9th August, 1870, on a judgment for \$4 408.97, which was rendered by the Circuit Court of Talladega, against said Player, in favor of Agnes T. Thrift, on the 6th May, 1869, in an action commenced on the 5th March, 1868; former executions on said judgments having been issued on the 18th May, and the 7th December, 1869. The decree in the chancery cause, under which the lands were sold by the register, was rendered in a cause in which said Riser, Welch, and Bell, as creditors of said Player, were the complainants, and said Player and Thomas H. Reynolds were defendants. The bill in that case was filed on the 1st March, 1869; and process was served on said Reynolds on the 30th March, and on Player on the 5th April, 1869. The complainants were creditors of said Player by simple contract only, each holding his promissory notes past due; and they filed their bill in behalf of themselves and such other creditors as might come in, seeking to set aside, as fraudulent and void against creditors, a mortgage of the lands here in controversy, executed by said Player to said Reynolds on the 7th April, 1866; and to enjoin Reynolds from selling the lands under the mortgage, and to have them sold and appropriated to the payment of the debts due to complainants and others. Wilson and Pope, two of the plaintiffs in this suit, were made parties complainant to the bill, on motion, on the 10th August, 1869. On the 10th August, 1870, the chancellor rendered a decree in the cause, setting aside the mortgage to Reynolds, on the ground that it was made with intent to hinder, delay, and defraud the creditors of the mortgagor; and it was "decree'd, that complainants be, and they are hereby declared invested with a lien on all the property mentioned in said mortgage, for the payment, *pro rata*, of their several claims;" and a reference to the register, as master, was ordered, to ascertain

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and report the amounts of the debts due to the complainants respectively. At the August term, 1871, the register's report was confirmed, without objection, and he was ordered to sell the lands on the first Monday in December, 1871; and the sale was accordingly made, the complainants becoming the purchasers, and was duly confirmed by the chancellor, at the February term, 1873. This was the title shown by the plaintiffs. (This chancery cause was brought to this court by appeal from an interlocutory decree overruling a motion to dismiss the bill for want of equity; and this court, affirming the chancellor's decree, held the mortgage fraudulent and void as against creditors.—See *Reynolds v. Welch*, 47 Ala. 200.)

On the trial, as the bill of exceptions shows, and after the commencement of the trial, the death of George Riser, one of the plaintiffs, being suggested, and admitted by defendants, "the plaintiffs' counsel then moved the court for leave to amend the complaint, by adding as new parties plaintiff the heirs-at-law of said George Riser; to which motion defendants objected, on the ground that more than eighteen months had elapsed since the death of said Riser;" and this fact seems to have been admitted. The court overruled the defendants' objection, and allowed the amendment as asked; and the defendants excepted. Several other exceptions were reserved by the defendants, to rulings of the court on questions of evidence, but they require no special notice.

In reference to the respective titles shown by the parties, the court charged the jury as follows: "(1.) If the evidence satisfies the jury that the plaintiffs, Riser and others, filed their bill in the Chancery Court of this county, on the 1st March, 1869, as creditors of Player, to set aside a mortgage on the lands here sued for, given by Player to Reynolds, and for the purpose of subjecting said lands to the satisfaction of their claims; then Mrs. Thrift was charged with notice of the pendency of such chancery suit, on the filing of the bill; and the filing of such a bill would have the effect to invest the Chancery Court with the sole jurisdiction and control of said property, so sought to be subjected, from the filing of the bill. (2.) And if a decree of said Chancery Court was afterwards rendered, setting aside said mortgage to Reynolds, and ordering a sale of said lands for the satisfaction of said creditors; and the lands were sold under said decree, and plaintiffs became the purchasers at the sale, and received from the register of the court a deed to said lands; then they have established such a title as would entitle them to recover in this action; (3.) the effect of the register's deed being to convey the title of said Player to plaintiffs; (4.) and

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the effect of the filing of said bill being to create a lien upon said lands, which would, if perfected by a decree and sale, render a purchase by a creditor, who obtained judgment after said bill was filed, and bought at a sheriff's sale under execution on such judgment, inoperative, although the suit brought by Mrs. Thrift may have been prior to the filing of said bill. (5.) If the creditors had filed no such bill; or, if, after filing, they had failed to obtain a decree, setting aside said mortgage, and subjecting said lands to the payment of their debts; then Evans would have a good title, for the deed of the sheriff, under that state of facts, would invest him with the legal title to the property. (6.) But a judgment obtained, and a sale of the lands by the sheriff, between the filing of the bill and the rendition of the decree subjecting the lands as before stated, would not avail Evans, or vest him with such a title as would defeat the purchaser at the register's sale of the property; (7.) and if there was such a decree and sale under said bill so filed, and plaintiffs bought at the same, and have the register's deed to the land, made at such sale, and by virtue thereof; then the plaintiffs are entitled to recover." To each portion of this charge, as indicated by the figures, the defendants reserved a separate exception; and they then requested the court, in writing, to charge the jury, "that if they believed all the evidence in the case the plaintiffs have offered, they cannot find a verdict for the plaintiffs." The court refused this charge, and the defendants excepted to its refusal.

The refusal of the charge asked, the several portions of the charge given, the allowance of the amendment to the complaint, and the several rulings on questions of evidence to which exceptions were reserved, are now assigned as error.

JOHN T. HEFLIN, with GEO. W. PARSONS, for appellants.

TAUL BRADFORD, *contra*. (No briefs on file.)

BRICKELL, C. J.—No civil action, if the cause of action survives, abates by the death, or other disability of the plaintiff, or of the defendant; but, on motion, the same must, within eighteen months after the occurrence of the disability, be revived against the legal representative of the deceased, his successor, or the party in interest. If the action is by or against several jointly, the death of one may be suggested, and, if the cause of action permits, the suit may be prosecuted by or against the survivors.—Code of 1876, § 2908. The action of ejectment, or the corresponding statutory real action, may be revived, on the death of either plain-

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tiff or defendant. If there is a sole plaintiff, or if there are several plaintiffs, the revivor may be in the name of the personal representative, and of the heirs or devisees jointly, or in the name of either; depending, in some degree, on the extent to which it is proposed subsequently to prosecute the action. If it is proposed to proceed for the recovery of the possession, and for damages accruing prior and subsequent to the death of the plaintiff, the revivor must be in the name of the personal representative alone, or in his name jointly with the heirs and devisees. The personal representative has the exclusive right of recovering such damages as accrued in the lifetime of the deceased plaintiff; and of them there can be no recovery, unless he is a party. He has, also, the right to intercept the entry and possession of the heir, or devisee, and to apply the rents, or, under the orders of the Court of Probate, make sale of the lands, for the payment of debts, or for distribution; and this confers upon him the right to revive the action in his own name, and to prosecute it to a final judgment, recovering the possession, and, as an incident, the rents accruing prior and subsequent to the death of his testator, or intestate. This right he is not bound to exercise—he may not intervene at all, or he may intervene only to recover the rents accruing prior to the death of his testator or intestate. In either event, the heirs or devisees may be made parties plaintiff.—*Ex parte Swan*, 23 Ala. 192; *State v. Nabors*, 7 Ala. 459; *Rowland v. Ladiga*, 21 Ala. 9.

In whatever right, and by the introduction of whatever parties, it is proposed to cure the abatement, the revivor, or the making a motion to revive, must be made within eighteen months after the occurrence of the disability. The statute is mandatory, and the right is barred, if it is not asserted within that period.—*Pope v. Irby*, 57 Ala. 105; *Brown v. Tutwiler*, 61 Ala. 372. More than eighteen months having elapsed after the death of the plaintiff, George Riser, and no suggestion of his death having been made, no motion entered for a revivor in the name of his personal representatives, or of his heirs or devisees, there was, as to him, and his rights and interests, an abatement which could not be cured. An amendment of the complaint, striking out his name and inserting the names of his heirs as plaintiffs, would not cure it. The office of an amendment of pleading is to cure defects or omissions, existing at the institution of the suit. That is the period of time to which it refers generally, and from which it takes effect. It produces a change in the pleading, plight and condition of the suit, while a revivor simply restores the cause to the condition in which it was

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when the abatement occurred. The principle and reason is thus stated in 1 Bacon's Abr. 11: "Here, the general rule to be observed is, that whenever the death of any party happens pending the writ, and yet the plea is in the same condition as if such party were living, there such death makes no alteration; for, when the death of the parties makes no change of proceedings, it would be unreasonable that the surviving parties should make any alteration in the writ; for, if such writ and process were changed, it would set rights but in the same condition they were in at the death of the parties; and it would be absurd that what made no alteration should change the writ and the process; and on this rule all the diversities turn." Nor is it the office of an amendment of a complaint, in an action at law, to introduce parties who have acquired interests and rights by mere succession to the rights and interests of the original parties. This is the office of a revivor; and the bar of the statute, as to a revivor, cannot be avoided by resort to an amendment. The Circuit Court erred in permitting the introduction of the heirs of George Riser, as parties plaintiff, by an amendment of the complaint.

A conveyance, fraudulent because of an intent to hinder, delay, or defraud creditors, is valid between the parties, and operative against all the world, except creditors who are pursuing legal remedies to compel the appropriation of the property conveyed by it to the satisfaction of their debts. Those only are sustaining immediate injury from it, and are in a condition to complain of it. As against a simple-contract creditor, it is valid; and, in the exercise of its original jurisdiction, a court of equity would not, at his instance, interfere for its vacation. The mere fact that he was a creditor, conferred upon him no particular, specific right or interest in or to the property of the debtor—no lien, or charge upon it, diminishing or embarrassing the right of alienation. Nor could it be known, until his demand was reduced to judgment, that he stood in the relation of a creditor, or that the remedies of the law were not adequate. The intervention of any court, at the instance of a stranger, to avoid contracts binding between the parties, or which they elect to treat as binding, would be unwarranted.

There were, however, two classes of cases in which a court of equity would intervene, for the relief of judgment creditors. The distinction between the two was well defined; the ground of jurisdiction, the character of relief granted, was in each essentially different. The right to the one relief might be lost, while the other would remain unimpaired. The *first* was, where the creditor sought to reach equitable

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assets, or assets which could not be reached by any process issuing on the judgment. In this class of cases, the court would not intervene, unless it was shown that legal remedies had been exhausted—a prosecution of execution to a return of *no property found*. Until then, the inadequacy of legal remedies would not be apparent, and there could be no ground for invoking equitable relief.—1 Brick. Dig. § 219, 655. The creditor obtained a lien by the filing of the bill, and was entitled to priority of satisfaction from the assets sought to be condemned.—*Id.* §§ 221-222. The other class of cases is when the judgment of the creditor, or the execution issuing upon it, entitles him to a lien upon the property, real or personal, of the debtor, but a conveyance declared fraudulent and void as to him by the statute of frauds, interposes an obstacle to the full enforcement of the lien at law. The conveyance is void, and the creditor could sell under his execution at law; but the conveyance would embarrass the sale, and cast a cloud on the title acquired by it. The court intervenes, to render the lien more available, by pronouncing the invalidity of the conveyance, and removing it as a cloud from the title. The filing of the bill gave the creditor a lien on the particular property, superior to any a subsequent judgment creditor could acquire; and superior to any title a purchaser, though *bona fide*, could obtain from the debtor.—*Dargan v. Waring*, 11 Ala. 988; 1 Brick. Dig. §§ 215-16-17, 655.

The statutes have enlarged the jurisdiction of the court, and equitable assets may now be reached by a simple-contract creditor, whenever the creditor is entitled to an attachment at law (Code of 1876, §§ 3846-3856); and “a creditor without a lien may file a bill in chancery to subject to the payment of his debt any property which has been fraudulently transferred, or attempted to be fraudulently conveyed, by his debtor.”—Code of 1876, § 3886. The purpose of this statute, its meaning and operation, cannot be misapprehended, and there is but little room for construction of it. As to property the debtor has *fraudulently conveyed*, or *attempted to convey fraudulently*, the simple-contract creditor is clothed with the same right to resort to a court of equity, entitled to the same remedy and relief, to which he or any other creditor having a lien was entitled before the statute. In other words, the necessity for a specific right, or a lien, to charge the property *fraudulently conveyed*, or attempted to be *fraudulently conveyed*, is dispensed with, as a condition on which the jurisdiction of the court depends. Though prior to, and at the time of the filing the bill, the creditor has no lien; yet, when the bill is filed, and process served, a lien is

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acquired on the property conveyed, which will prevail over any subsequent alienation by the debtor or his grantee, and over the claims of subsequent judgment creditors, or of an assignee in bankruptcy.—*Dargan v. Waring*, *supra*; *Sedgwick v. Menck*, 6 Blatchf. 156; *Carr v. Thorington*, 63 N. C. 560; *Fetter v. Cirode*, 4 B. Mon. 482; *Wooten v. Clark*, 23 Miss. 75; *Storm v. Waddell*, 2 Sandf. Ch. 494.

In this case, each party deduces title from Player, and claims to be vested with the legal estate in the premises, derived from him through judicial sales. The defendants claim under a sheriff's sale, made in execution of a judgment rendered on the first day of May, 1869, near or quite a month after Welch and others had obtained a lien on the premises, by the filing of the bill to set aside as fraudulent the mortgage to Reynolds. There was no laches in the prosecution of that suit to a final decree, perfecting the lien, and condemning the premises to sale. The plaintiffs are purchasers under that decree, and have obtained a conveyance from the register, the sale to them having been confirmed by the Court of Chancery. That they have the superior title, is a proposition too plain for argument. The maxim applies, *qui prior est in tempore, potior est in jure*. A pending suit in equity, not collusive, duly prosecuted, operates as a notice to all the world; and a purchaser during its pendency, of the real estate involved, when the purpose of the suit is to charge the estate, is affected and bound by the decree, as if he were an actual party to it.—*Harris v. Carter*, 3 Stew. 233; *Chaudron v. Magee*, 8 Ala. 570; *Fash v. Ravies*, 32 Ala. 451.

We do not deem it necessary to review at length the instructions of the court to the jury. They were in substantial conformity to this view, and there is no error in them, prejudicial to the appellants. For the error first noticed, the judgment must be reversed, and the cause remanded.

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Statutory Action in Nature of Ejectment.

1. *Homestead exemption; occupancy.*—Under the constitutional and statutory provisions which were of force in 1873-4, actual occupancy was necessary to support a claim of homestead exemption: if the owner removed from the premises, though under the advice of a physician, and with the declared in-

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tention of returning, and rented them out by the year, the exemption was forfeited and lost.

APPEAL from the Circuit Court of Henry.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Rabun S. Stow against Newell M. Thornton, tenant in possession, to recover the possession of a house and lot in the town of Lawrenceville in said county, containing about two acres, together with damages for its detention; and was commenced on the 8th February, 1878. Mrs. Mary F. Lillie, widow of George Lillie, deceased, was made a party defendant, as the landlord of tenant in possession; and she defended under a claim of homestead exemption, while the plaintiff claimed under a sheriff's deed and purchase at execution sale against said George Lillie in his life-time. On the trial, as the bill of exceptions shows, the following facts were agreed on and admitted:

"Judgment was rendered in the Circuit Court of Henry, on the 8th September, 1874, against said George Lillie, for \$506, on a demand created on the 20th June, 1873; execution on said judgment was issued on the 21st September, 1874, and an *alias* on the 22d April, 1875, which was levied on the land now sued for, as the property of said George Lillie. Said land, which was not worth \$2,000, was sold by the sheriff under said *alias*, after due advertisement, on the 5th July, 1875; and the plaintiff became the purchaser at said sale, and received the sheriff's deed. At the time of said sale, one Batchelor was in the actual possession of said premises, holding in the manner and under the circumstances herein-after named. George Lillie was the owner in fee of said premises for a number of years prior to 1875; was a married man, and the husband of the defendant in this case, Mrs. Mary F. Lillie, whom he had married some ten or fifteen years before, and with whom, as his wife, he continued to live up to the time of his death, which occurred on the 6th February, 1876. George Lillie had two children by his said wife, who were under the age of fourteen years in July, 1875, and are now living with their said mother, and dependent alone upon her physical labor and exertions for support and maintenance. Said premises were the actual homestead of said George Lillie, upon which he, with his said wife and children, actually lived until about the first of the year 1875; at and before which time, he had become in very ill health, which had rendered him very feeble, and debilitated physically, in so much that he was unable to carry on his business, he being a mechanic, and by which means alone his family was supported and maintained. About the first of said year,

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1875, said Lillie being under the medical care of a physician, who resided near him, was advised by said physician that a change of location from his said residence was necessary to the improvement of his health ; and that a change from said premises to Eufaula, in said county, for a change of water and treatment by physicians in Eufaula, would greatly promote and improve his health ; and by said counsel and advice of his physician, in whom he had very great confidence, and who is justly held in high esteem in his profession, said Lillie was induced to move with his family to Eufaula about the first of the year 1875 ; and left said premises for the purpose of benefitting his health, and with the declared purpose and intention of returning, and continuing the actual occupancy of said premises as his homestead, as soon as his health should be restored, as he expected it would be, by said change. After his removal to Eufaula, said Lillie continued to linger with the disease he had on going there, until he died with said disease.

“ Before said Lillie actually left said premises, he had rented another place which belonged to him, and which adjoined said premises, to said Batchelor, for the year 1875, at the price of \$50 ; and said Batchelor had taken possession, and was residing on said rented place with his family, the place having suitable buildings and conveniences for a residence and farm. About the time said Lillie was preparing to go with his family to Eufaula, he rented the lot now sued for to one Couric, for \$50 ; but Couric failed to comply with the contract, and the same was rescinded. Said Lillie, before his removal, offered to rent the said house and lot to one Thornton, for \$50, but Thornton declined ; and Lillie then saw said Batchelor, and asked him to exchange houses, and to take possession of the house and lot now sued for, at the same price ; and Batchelor did so. Said Lillie thereupon rented the house vacated by said Batchelor, for the balance of the year 1875, to one Wilkins. Under this agreement and arrangement, Batchelor claimed to have rented said house and lot for the balance of the year 1875, and so held possession of the same for that time. Before the sale of said house and lot by the sheriff, said Lillie made and presented to him his claim in writing, in due form, of the exemption of said premises as his homestead ; but the sheriff, notwithstanding the said claim of exemption, proceeded and sold said premises, and plaintiff became the purchaser ; and the sheriff's said deed is the only evidence of title on which plaintiff relies in this suit. Neither George Lillie nor his family have ever occupied the said premises, since the early part of the year 1875 ; and since the year 1875, the same has been rented out

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annually by Mrs. Mary F. Lillie, as the widow of said George Lillie, and she has claimed the same as the homestead of her said husband, and as the homestead of his family since his death. N. M. Thornton is now in actual occupancy of the same, under contract of rent from Mrs. Mary F. Lillie; and the value of the rent for the year is \$25. Mrs. Lillie and her said minor children own no other land or premises as a homestead.

"The foregoing being all the evidence, the court charged the jury, at the written request of the defendant, if they believed the evidence, they must find for the defendant. The plaintiff excepted to this charge, and requested the court, in writing, to instruct the jury, if they believed the evidence, they must find for the plaintiff. The court refused to give this charge, and the plaintiff excepted to its refusal."

The charge given, and the refusal of the charge asked, are now assigned as error.

J. G. COWAN, and JOHN D. ROQUEMORE, for appellant, cited *Kaster v. McWilliams*, 41 Ala. 302; *McConneghy v. Baxter*, 55 Ala. 379; *Shulman, Goetter & Weil v. Boyle*, 59 Ala. 566.

D. M. SEALS, *contra*.

MANNING, J.—We are not able to perceive any material difference between this case and that of *Shulman, Goetter & Weil v. Boyle* (59 Ala. 566). The debt, to satisfy which the property in controversy was sold, had its origin in 1873, and was reduced to judgment in 1874. The house and lot of land were leased to a third person for the year 1875, and afterwards, in such a manner that they were not and could not be occupied, during that time, as the homestead of the debtor or his family; and without being such homestead, the property was not exempt from execution. The act of February 9th, 1877, not having been then passed, the case is not brought within its 26th section, carried into the Code of 1876, as section 2843.

Let the judgment of the Circuit Court be reversed, and the cause be remanded.

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Action on Promissory Note, by Assignee against Maker.

1. *Liability of property to payment of debts.*—In the absence of statutory and constitutional exemptions, property of every kind, and every beneficial interest therein may be subjected to the payment of the owner's debts; and property subsequently acquired is, under the provisions of the Federal constitution, equally liable with that owned by the debtor when the debt was created.

2. *Waiver of exemption.*—A waiver of exemptions, when intended to apply only to a part of the property exempted, must specify the part to which it is intended to apply; but, when the waiver is of all exemptions, or all claim of exemption, no specification of the property is necessary.

3. *Same.*—A waiver of all exemptions, or of all claim of exemption, by a married man, though not valid as to the homestead without the signature of the wife (Code, §§ 2847), will be held valid and operative as to the exemptions of personal property, *ut res magis valeat quam pereat*.

4. *Same.*—A waiver of all exemptions, incorporated in a promissory note as a part of its consideration, when not expressly limited to property then owned by the debtor, applies equally to property afterwards acquired by him.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. LOUIS WYETH.

This action was brought by Albert G. Henry, against John H. Neely; was commenced on the 4th August, 1879, and was founded on a promissory note, signed by the defendant, of which the following is a copy:

"\$134.34. Guntersville, Ala., January 1st, 1877. One day after date, I promise to pay A. G. Henry & Co. one hundred and thirty-four 34-100 dollars, for value received; and as part of the consideration, I hereby waive all and every right which I may have, under the constitution and laws of Alabama, to have any property exempt from levy and sale under legal process; it being the true intent and meaning of this waiver of exemption, to subject my property to the payment of this note in full, of principal and interest."

The defendant craved oyer of the note, and filed five special pleas, as follows: 1. "So far as the alleged waiver of exemption, purporting to be embraced in said promissory note, is concerned, that he is, and was when he signed said note, a resident citizen of the State of Alabama, and the husband of a wife then and now living; that said waiver relates to real property, and is not signed by his wife, and attested by a subscribing witness; and that no property is specified in said instrument, the right to sell which is waived."

2. "That the said pretended waiver of exemption is not in

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an instrument separate from the promissory note." 3. "That no property is specified in said alleged waiver of exemption." 4. "That he now owns no property which he owned at the date of the said note, except one bedstead (for which he does not resist the rendition of an order of sale); but he has acquired all the property he now owns, with said exception, and with the exception specified in the affidavit herewith filed as a part of this plea, marked 'Exhibit C,' since the execution of the said note; and he says that the said paper, sued on in this action, does not waive his right to claim, as exempt from sale by legal process, the property thus acquired." 5. "That all the property he now owns is situated as stated in the last preceding plea; and that he had no inchoate right to any of the same when the said note was executed." The court sustained a demurrer to each of these pleas; and the cause was then submitted to the jury on issue joined, but upon what plea the record does not show.

The jury having returned a verdict for the plaintiff, for the amount due on the note, the court thereon rendered judgment in his favor, in the usual form. The bill of exceptions then proceeds thus: "Plaintiff now moves for a judgment, in accordance with section 2849 of the Code of Alabama, directing the sheriff to sell personal property of the defendant that is exempt from execution, for the satisfaction of said judgment; and defendant objects to the same, on the grounds, and for the reasons specified and relied on in his said pleas filed in this cause. The facts of the case are agreed to be the following: All the property defendant now owns has been acquired by him since the execution of the said promissory note, except one bedstead, the sale of which is not resisted under said judgment. Defendant owns no real estate. The facts stated in the pleas, and in the affidavit marked 'Exhibit C,' are agreed to be true. Thereupon, the court grants the plaintiff's motion, and renders judgment accordingly, to which the defendant excepts," &c.

The several rulings of the court on the pleadings, and the judgment, are now assigned as error.

D. P. LEWIS, for appellant.—1. The contract of waiver is void, because it does not specify the part of the debtor's property to which it applies. This is the requisition of the statute (Code, § 2847), and it is as necessary to the validity of the waiver as that it should be in writing. The waiver is void, also, for uncertainty, because it specifies no property as the subject-matter to which it relates.—*Moore v. Smith*, 19 Ala. 774; *Erwin v. Williams*, 25 Ala. 236. A specific per-

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formance of it could not be enforced, because of its uncertainty.—Pomeroy on Contracts, §§ 159–60, and notes.

2. If the contract is not void, a proper and reasonable construction of it would make it apply only to the property which the debtor then owned. The laws of force at the time a contract is made, enter into it, and form part of its stipulations.—1 Brick. Dig. 908, 255; *Sneider v. Heidelberg*, 45 Ala. 126; Smith on Homestead Exemptions, § 15, and cases cited. A grant shall not be taken unreasonably against the grantor, although construed liberally in favor of the grantee.—2 Parsons on Contracts, 506, citing 1 Plowden, 161. As exemption laws are construed liberally in favor of the debtor, it would be unreasonable to construe a waiver of exemption strictly against him, or to extend its operation by construction. Besides, property must be *in esse*, or at least in process of being created, before it can be the subject-matter of a contract.—*Cooper v. Douglass*, 44 Barbour, 409; *Williams v. Briggs*, 23 Amer. 578. A creditor may lay hold of what his debtor has acquired, but not of his power to acquire; and no contract will be construed to convey such an oppressive right.—41 N. Y. 343; 33 N. Y. 518; 22 N. Y. 249.

3. The judgment and execution, as well as the contract, must specify the property which the sheriff is authorized to sell, as in a judgment against the separate estate of a married woman.—Code, § 2849. But the judgment here specifies no property, and directs a levy on all the personal property of the defendant, without limitation or restriction, and subjects any property he may acquire until the debt is paid. This is against the policy of the exemption laws.—22 N. Y. 249.

THOS. H. WATTS, *contra*.—No question can arise as to the right of a debtor to waive his exemptions, whether statutory or constitutional. The right of waiver is expressly provided for, and is as broad as the right of exemption. The waiver in this case is very general in its language, and shows an intention to waive any and every exemption, present or prospective. It could not apply to or include the homestead, nor was it intended to do so; but no question of homestead is involved, as the debtor had none, and the judgment is limited to personal property. It was not necessary to specify any particular property, as the subject of the waiver; for the intention evidently was to waive the right of exemption in any and all property. A specification of the property is necessary only when the waiver is partial.

BRICKELL, C. J.—In the absence of statutory or con-

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stitutional exemptions, the law subjects to the payment of debts any and every beneficial interest of the debtor in property, real or personal, whether the interest is legal or equitable, held severally, jointly, or in common with others. Nor is there any intendment that the parties have in view only the property which the debtor may own at the time of entering into a contract, or to which he may then have an inchoate right. Subsequently acquired property is as liable to the payment of debts, as that the debtor may own at the time of creating a debt. A State law, which sought to release such property from liability for the payment of past debts, would impair the obligation of contracts, and violate the constitution of the United States.—*Sturges v. Crowninshield*, 4 Wheat. 198; *Nelson v. McCreary*, 60 Ala. 301.

The constitution makes liberal exemptions of property, real and personal, from liability for the payment of debts, but declares, "The right of exemptions, hereinbefore secured, may be waived by an instrument in writing; and when such waiver relates to realty, the instrument must be signed by both the husband and the wife, and attested by one witness." Statutes have been passed to regulate the mode of waiving, and suits and judgments upon contracts as to which the right of exemption has been waived, and are now embodied in the Code, forming the second chapter of part two, title 6, sections 2846-50. It is first provided, generally, that the claim of exemption may be waived by an instrument in writing; secondly, that any person, entering into a written contract to perform service or work, or to pay money or property, may, by stipulation in writing, waive homestead, and other exemptions under the provisions of the preceding chapter (which defines the extent of the exemptions, adding to those made by the constitution), either in whole or in part, specifying the part to which the waiver relates; but, if the waiver is by the husband, and of the homestead, or any part thereof, it is not valid without the voluntary signature and assent of the wife, &c. It is next provided, that where the purpose is to waive the exemption as to personal property, if the intention to waive is clearly expressed, it may be included in *any instrument of writing, bill of exchange, promissory note, or contract*; but, if the waiver is of real estate, it must be made by a separate instrument in writing.

The note on which the present suit was founded, was given by a married man, and contains this clause: "I hereby waive all and every right which I may have, under the constitution and laws of Alabama, to have any property exempt from levy and sale under legal process; it being the true intent and meaning of this waiver of exemption, to sub-

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ject my property to the payment of this note in full, of principal and interest." The validity of this waiver is questioned upon several grounds; the first of which is, that the part of the debtor's property, to which it applies, is not specified. A specification of the property is necessary, when the waiver extends to a part. It is the right of the debtor to waive the exemption as to a part, or as to the whole of the property. If the waiver extends only to a part, the part must be specified, so that the property which becomes subject to the payment of the debt, may be identified, and distinguished from that which is not liable. When the waiver is of *all claim of exemption*, as in the present case, there can be, of course, no specification of particular property. The constitution and statute confer an unqualified right on the debtor, to waive not only the exemption of particular property, but *the claim for the exemption of any property which is now, or may be, exempted from sale on execution or other process.*

It is next insisted, that the waiver is not valid, because it is in terms broad enough to include the homestead, and is embodied in the promissory note, which is not signed by the wife of the debtor. A waiver of exemption is a contract, and it must be construed, and have the operation and effect of other contracts. As a waiver of the claim to a homestead, or other realty, the clause found in the note is without operation or effect, not only for the want of the signature of the wife, but because the statute prescribes a separate instrument, as the only mode of waiving an interest in lands. This, however, is not a reason for pronouncing the waiver invalid, but a reason for reading its general words as intended by the parties to operate only on the claim of exemption of personal property. There is no rule of construction of written instruments, of more general application, or more beneficial in giving effect to the intention of the parties, than that it shall, if possible, be so interpreted *ut res magis valeat quam pereat*; and where a contract cannot operate in the precise manner, or to the full extent, intended by the parties, it shall, nevertheless, be made as far as possible to effectuate that intention. The intention to waive his claim of exemption, as far as he could do so by a clause inserted in a promissory note, is clearly expressed. It was doubtless on the faith of the waiver credit was extended to him. The purposes of justice, the intention of the parties, are answered by simply interpreting it as a waiver of the claim of exemption of personal property.

The waiver may, as in this case, be broad enough in its terms to embrace not only property owned at the time of making it, but subsequently acquired property: it may be as

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broad as the right of exemption; and that is not limited to property owned when the debt is contracted, but attaches to subsequently acquired property, as ownership may vest in the debtor. We have noticed the several objections taken to the validity of the waiver, and concur with the Circuit Court, that they cannot be sustained.

Let the judgment be affirmed.

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Action for Damages against Railroad Company.

1. *Measure of damages.*—In an action on the case to recover damages for a private and personal injury caused by a nuisance, each day's continuance of the nuisance being an independent cause of action, there can be, generally, no recovery for injury suffered after the commencement of the suit; but, when the action is brought for an injury to the person, caused by a negligent or wrongful act not continuous in its nature, for which but one action can be maintained, the plaintiff may recover compensation for the disabling effects of the injury, prospective as well as past.

2. *Same.*—In such action, to recover damages for an injury to the person, the jury may, in estimating the damages, consider the expenses of the cure; and the proper cost of future treatment or nursing, when the injury is permanent or irremediable; and the loss of time up to the verdict; and probable future loss, or incapacity to do as profitable labor as before; and suffering, mental and physical, proximately caused by the injury.

3. *Exemplary damages.*—In an action against a railroad company, to recover damages for personal injuries caused by the failure and neglect to keep in proper repair a bridge over a public highway, the plaintiff may recover exemplary or punitive damages, if the negligence was gross; and the degree of negligence is a question for the determination of the jury, under proper instructions from the court.

4. *What is negligence.*—To render a railroad company liable for damages, on account of personal injuries caused by its failure and neglect to keep in repair a bridge across a public highway, it is not necessary to show that the company had knowledge of the defect in the bridge: it is its duty to exercise watchful diligence in keeping the bridge in repair, and it is chargeable with knowledge of every defect which such diligence would have discovered.

5. *To what plaintiff, as witness, may testify.*—The plaintiff, testifying as a witness to her personal injuries, may state, "In consequence of loss of time, and physical disability from the injuries, she had been prevented from earning money by her labor, and had been injured fifty dollars within the four months next after the fall, in consequence of the hurts caused by the fall." This, in substance, is an assertion that her labor during that time would have been worth fifty dollars.

6. *To what witness may testify.*—The following expressions, used by a witness testifying as to the personal injuries received by the plaintiff, "though awkwardly expressed sometimes, are, at most, conclusions of fact," and are not improperly allowed: "Plaintiff seemed to be suffering" the day after the injury; "she was not able to return home" on that day; "was not able to use her arm a large part of the time for several months;" "when she returned home,"

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on the second day after the injury, "she looked bad, and her left wrist looked like the bone had slipped off the joint;" "she was disabled by the fall," &c.

7. *Charge on facts conceded.*—The court may charge without hypothesis on facts which are conceded: such a charge is not an invasion of the province of the jury.

8. *General exception to charge.*—A general exception to an entire charge, consisting of several distinct propositions, may be overruled entirely: the objectionable clause or portion should be specified and clearly pointed out, so that the attention of the court and the opposing counsel may be drawn to the supposed error.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. WM. L. WHITLOCK.

This action was brought by Mrs. Sarah McLendon against the appellant, a corporation chartered under the laws of Alabama, to recover damages on account of personal injuries sustained by her while crossing a bridge on the public road between Calera and Elyton, at a place where the track of the railroad crossed the public road; the injury being caused by the horse, which the plaintiff was riding, falling through the rotten planks of the bridge, and throwing her heavily to the ground; and the defendant being bound to keep the bridge in repair, it being built across a ditch which had been dug to carry off the water from the side of the railroad. The injury occurred on the 21st August, 1877; and the action was commenced on the 5th January, 1878. The record does not show what pleas were filed.

On the trial, as the bill of exceptions states, the plaintiff was examined as a witness for herself, and thus testified: "On the 21st August, 1877, she and her daughter, Mrs. Sarah Moore, were riding on horseback along the public road leading from Calera to Elyton, which crosses the track of the South and North Alabama railroad; said railroad having been built across said public road one half mile north of the depot called Whiting, which is in Shelby county. Plaintiff and Mrs. Moore approached said railroad from the eastern side, to cross at said crossing. At this crossing, there is a ditch on each side of the railroad, three feet deep, and several feet wide, which had bridges over them covered with plank, and which had been dug by the defendant to drain the railroad track; the bridges being built by the defendant on its right of way. When plaintiff and Mrs. Moore approached the bridge over the ditch on the eastern side of the railroad, they rode abreast upon the bridge, and the fore-feet of plaintiff's mare broke through the bridge, and the fore-legs of the mare, up to her breast, went through the bridge, and her body and nose struck the bridge; and the plaintiff was thrown from her. The falling of the mare's feet through the bridge was caused by the breaking of the plank which

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formed the covering of the bridge, and which was decayed. Witness did not remember whether one plank broke entirely, its full width, or whether two plank were broken part of their width. By being thrown from the mare, plaintiff was thrown across the track of the railroad, and struck the end of the bridge on the opposite side of the road; and her left wrist, left arm and shoulder, and left side were injured and bruised, her wrist and shoulder being dislocated; her face was hurt, and she suffered great pain and loss of sleep, for three or four months, from these injuries. During the time she was suffering from these injuries, plaintiff *was in great fear that her arm would have to be amputated.* "During the time she was suffering from these injuries, *she supposed that she never would recover from the injuries.*" "Plaintiff testified, also, *that she had suffered continuously from the injuries, from the time she received them, up to the time of the trial, and was suffering from said injuries at the time of the trial.*" "At the request, and under the direction of her counsel, plaintiff showed her left wrist to the jury, and called their attention to a knot on the left side of the joint, indicating partial dislocation of the joint." "Plaintiff testified, also, *that she had been materially injured by the hurts caused by the fall, which prevented her from earning money by her labor, as she did before the injuries were received;*" "that she had been disabled by the said injuries, *so as to make considerable difference between her ability to do labor before she received the injuries, and her present ability to labor;*" "also, *that in consequence of loss of time, and physical disability from the injuries she had received, she had been prevented from earning money by her labor, and she had been injured fifty dollars, within the four months next after her fall from the mare, by reason and in consequence of the hurts caused by the fall from the mare.*" To the several italicized portions of this evidence, the defendant objected, and reserved an exception to the overruling of each separate objection.

Mrs. Sarah Moore, the plaintiff's daughter, who was riding with her at the time the accident occurred, was examined as a witness for plaintiff, and described the accident substantially as plaintiff had described it; and she further testified as follows: "Plaintiff's left hand, wrist, arm and shoulder, and her left side, and her face were hurt by the fall. After resting about an hour at the bridge, plaintiff and witness went to Mrs. Griffin's on the day the accident occurred (Tuesday), and remained there during Wednesday, and returned to the residence of plaintiff on Thursday. *The plaintiff seemed to be suffering during the time she remained at Mrs. Griffin's.*" "Plaintiff was not able to return from Mrs. Griffin's on Wednesday to her own residence." "There is quite a differ-

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ence in the condition of the plaintiff, before she fell from the mare at the bridge, and since that time." "*Plaintiff was not able to use her arm a large portion of the time, for several months after her said fall.*" To each separate portion of this testimony which is italicized, the defendant objected, and reserved an exception to the overruling of each separate objection. Mrs. Bailey, another witness for the plaintiff, testified that, "when plaintiff returned from Mrs. Griffin's on Thursday, after falling from the mare on Tuesday, *her left wrist looked like the bone had slipped off the joint;*" also, "that plaintiff, when she returned from Mrs. Griffin's, *looked bad;*" also, "that the plaintiff *was disabled by the fall from the mare.*" To each separate portion of this testimony, as italicized, the defendant objected, and duly excepted to the overruling of each objection.

Thomas Bailey, another witness for the plaintiff, testified, "that he crossed the railroad track two or three times a week, for several years, at the place where the mare fell; that there was a hole in the bridge on the east side of the railroad, for several weeks before the 21st August, 1877, which hole was sometimes open, and sometimes closed by a piece of plank laid over it; to which the defendant objected," and duly excepted to the overruling of the objection. John Ozley, another witness for the plaintiff, who was the overseer of the public road at the crossing where the accident occurred, testified that, "between the 20th and 30th July, 1877, there were two holes in the bridge on the east side of the railroad, each one being about six inches in width;" to which statement objection was made, and exception duly reserved by the defendant. William McLendon, another witness for the plaintiff, "testified that, a few days before plaintiff fell from the mare, there was a hole in the said bridge three or four feet long;" to which statement, also, the defendant objected, and duly reserved an exception to the overruling of the objection.

"The court charged the jury, of its own motion, that if they attained the conclusion that the plaintiff's mare fell through the bridge; and that the bridge was on the defendant's right of way, and was built by defendant; and that said fall was caused by the negligence of the defendant to keep said bridge in a condition which was safe to persons travelling along the said public dirt road; and that she was thrown from her mare by said fall, and was injured by having been so thrown from her mare; then she was entitled to recover a reasonable compensation for all the actual and consequential damages which resulted from such injury or injuries; such as, the expense of her cure, the value of time

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lost by reason of the injuries, a fair compensation for her physical and mental suffering caused by the injuries, as well as for any permanent reduction of her ability to earn money, so far as the same was caused by such injuries.

"The court charged the jury, also, of its own motion, that if the plaintiff was injured, and the injury was caused by the negligence of the defendant, then she was entitled to recover not only the amount of damages which she suffered prior to the commencement of the suit, but also all damages proceeding continuously from the injuries complained of, which she has suffered up to the trial, and which it is reasonably certain she will suffer in the future, as a consequence of said injuries."

The defendant excepted to each of these charges as given, and requested the court to give the following charges, which were in writing: 1. "If the jury believe, from the evidence, that the plaintiff is entitled to recover in this action, then, in estimating the damages, they can only take into consideration the actual damages done to plaintiff; and she can not recover for vindictive or exemplary damages in this action." 2. "That to find a verdict against the defendant in this case, the negligence, if any, must be brought home to the defendant—that is to say, to its president, directors, or general superintendent." 3. "If the jury believe that the defendant had no knowledge of any deficiency in the crossing (?) and upon the question whether or not the defendant was negligent in not using proper diligence in respect thereto, and that for the want of diligence, or by reason of such negligence, they were not informed of the deficiency if there was any—that the question is one of diligence or not, and the defendant can be charged, if at all, only on the ground of its own negligence, or want of diligence, and such (?) must appear in order to charge the defendant; and unless such knowledge is shown, the plaintiff can not recover in this action." The court refused each of these charges, and the defendant duly excepted to their refusal.

The charges given by the court, the refusal of the several charges asked, and the numerous rulings on questions of evidence to which exceptions were reserved as above stated, are now assigned as error.

J. T. HEFLIN, S. F. RICE, and THOS. G. JONES, for appellant.
1. The court erred in overruling the several objections to the plaintiff's own testimony as a witness.—*Johnson v. The State*, 17 Ala. 618; *Gassenheimer v. The State*, 52 Ala. 317; *Oxford Iron Co. v. Spradley*, 51 Ala. 171; *Barbour County v. Horn*, 48 Ala. 566; *Polly v. McCall*, 37 Ala. 30; *Herrick v. Lapham*,

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10 John. 281; *Andrews & Brother v. Jones*, 10 Ala. 460; *Jones v. Donnell*, 13 Ala. 511; *M. & W. P. Railroad Co. v. Varner*, 19 Ala. 185, and authorities cited in opinion.

2. Whatever latitude may be allowed to the plaintiff, when testifying as a witness to her injuries and feelings, other witnesses should have been confined to a statement of facts; but their testimony, as admitted by the court, against the objections of the defendant, was either the statement of a conclusion from facts, or the expression of an opinion; and sometimes a statement of the very fact, or conclusion, which it was the duty of the jury to determine.—*Gassenheimer v. The State*, 52 Ala. 317; *Johnson v. The State*, 17 Ala. 618; *Walker v. Walker*, 34 Ala. 473; *Corley v. The State*, 28 Ala. 24; *P. & M. Bank v. Borland*, 5 Ala. 531; *Peake v. Stout*, 8 Ala. 647; *Whetstone v. Branch Bank*, 9 Ala. 875; *Clement v. Cureton*, 36 Ala. 120; *Nuckolls v. Pinkston*, 38 Ala. 615; 1 Greenl. Ev. §§ 98-100; *Railroad Co. v. Varner*, 19 Ala. 185.

3. In this action, prospective damages could not be recovered.—*Stein v. Burden*, 24 Ala. 147; *Polly v. McCall*, 37 Ala. 30; *Duncan v. Markley*, 1 Harper's Law, 276.

4. Each of the charges given by the court, *ex mero motu*, invaded the province of the jury, in assuming that the accident occurred on a "public dirt road." When the testimony is oral, even though it be clear and undisputed, its credibility must be referred to the jury, and can not be assumed by the court.—*Stewart v. Russell*, 38 Ala. 19; *McKenzie v. Br. Bank*, 28 Ala. 611; *Corley v. The State*, 28 Ala. 24; *Foust v. Yielding*, 28 Ala. 658; *Herges v. The State*, 30 Ala. 45; *Davidson v. Woodruff*, at present term. The second affirmative charge is objectionable, also, because it makes the defendant's liability depend upon two questions of fact only, and ignores every other element of the plaintiff's right of recovery. *Holmes v. The State*, 23 Ala. 17; *Rowland v. Ladiga*, 21 Ala. 10. This charge is erroneous, also, in saying that "all damages proceeding," &c., may be recovered; while the law says, that the damages must be the natural and proximate result of the injury. The true rule as to damages is stated in the case of *Milwaukee & St. Paul Railroad Co. v. Arms*, 91 U. S. R. 495.

HARGROVE & LEWIS, and WILSON & WILSON, *contra*.—1. It is the duty of railroad companies to restore roads, bridges, &c., with which they have interfered, to such condition as will not impair their usefulness. —Shear. & Redf. on Negligence, § 452, notes 1, 2, 3; §§ 357-8, note 2. When the owner of land, over which a public road passes, digs a race-way across the road, and builds a bridge over it, he is liable for

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damages arising from the imperfection of the bridge.—Waite's Actions and Defenses, vol. 1, p. 732, and cases cited; 6 Johns. 90; 4 Pick. 341. When it is the duty of any person, or of any corporation, to keep a bridge in repair, damages may be recovered against him or it by any person sustaining injuries by the neglect of that duty.—Waite, *supra*, p. 732. That railroad companies are liable for injuries resulting from the dangerous state of highways crossed by their works, see Redfield on Railroads, vol. 1, p. 420.

2. As to damages, and the measure thereof, see *Holyoke v. Grand T. P. Company*, 48 N. H. 541; Sedgwick on Damages, 703. In an action for personal injuries, caused by negligence, the plaintiff can recover the expense of his cure, and a fair compensation for his sufferings, physical and mental, caused by the injury, as well as for any permanent reduction of his capacity to earn money.—Shear. & Redf. on Negligence, § 606, notes 3 and 4, on pages 684-5. The recovery is not limited to damages up to the commencement of the action, but may include damages up to the rendition of the verdict, and future damages which it is reasonably certain that he will suffer.—*Ib.* § 597, note 3.

3. That exemplary damages may be recovered against a railroad company, in such an action as this, see Field on Damages, §§ 80-85; *Goddard v. Grand Trunk Railroad Co.*, 57 Maine, 202; *Ashcraft v. Railroad Co.*, 48 Ala. 15; *Cooper v. Mullins*, 30 Geo. 146; Shear. & R. on Negligence, § 600.

STONE, J.—An action on the case is the proper remedy for a personal injury, not directly produced, but consequent on the negligent conduct of another. It is equally the remedy for a nuisance, causing individual wrong, which is the consequence of some unauthorized act or omission of another. There is this wide difference in the two classes of cases: In the former, the tort or wrong, from which the injury results, expends its force and vitality at once, and there is no repetition or continuance of the wrongful act, although the injurious consequence complained of may be of lasting duration. A nuisance is a continuing wrong, each day of which, being an independent wrong, furnishes an independent cause of action. On this account, the rule and measure of recovery in the two classes of cases is essentially different. In most actions for injuries caused by a nuisance, there can be no recovery for injury suffered after commencement of the suit; for such injury, being a new and independent nuisance, will support another action. But, when the injury is to the person, and the wrong which causes it is not continuous in its nature, then there can be but one action for its redress,

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no matter how permanent or lasting the disability, pain or suffering may be. Hence, in such action, the party injured may recover in one and the same suit compensation for the disabling effects of the injury, whether past or prospective. In estimating the damages, the jury may consider the expenses of the cure; and if the injury is permanent or irreparable, or will require future treatment or nursing, the proper costs of this may be added. And the loss of time up to the verdict, and probable loss, or incapacity to do as profitable labor, in the future, and physical and mental suffering proximately caused by the injury, are, when established to the satisfaction of the jury, pertinent and legitimate factors in making up the sum of the damages which the jury may award to the plaintiff.—*Barbour Co. v. Horn*, 48 Ala. 566, 577; 2 Redf. on Railways, § 199, par. 9; *Stein v. Burden*, 24 Ala. 130; *Polly v. McCall*, 37 Ala. 20; 2 Greenl. Ev. § 267; *Pym v. Gr. Northern Railway Co.*, 2 Best & Smith, Q. B. 759; *Fair v. London & N. W. Railway Co.*, 21 L. T. Rep. 326; *Sanders on Negligence*, 237; *Snedicor v. Davis*, 17 Ala. 472.

3. Another important inquiry in this case is, can there, in this form of action, be a recovery for an amount beyond the actual injury sustained, measured by a pecuniary standard, or can the jury give exemplary, or punitive damages? And if the latter, under what conditions can they be imposed? In *Barbour County v. Horn*, 48 Ala. 577, which was an action on the case for injury to the person, caused by negligently permitting a public bridge to remain out of repair, or for not requiring a proper bond from the builder of the bridge, this court first pronounced that the complaint was insufficient, and that there could be no recovery upon it as it then stood. Supposing the complaint might be amended, the court proceeded to discuss the question of the measure of damages, and said, "In such a case as this, there can be no vindictive damages." The opinion does not disclose why there could be no vindictive damages in that case. We do not think it was the intention of the court to affirm, that vindictive damages can in no case be recovered, for an injury caused by the negligence of another; for, in the same opinion, it is said, "Where there is no malice connected with the wrong complained of, or such gross negligence, or oppression, or fraud as amounts to malice, the compensation, or amount of damages, should be confined to the actual injury and its immediate effects upon the person of the plaintiff, when the action is for harm to the person, which seems to be the case here." We suppose the meaning of the court was, that the very nature of the charge of negligence, imputed to the county

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in that case, repelled all idea of gross negligence, and, therefore, there could be no vindictive damages.

In Sedgwick on Damages, 3 ed., 477, it is said: "Where gross fraud, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant, and hold up an example to the community." In a note, many authorities are cited in support of this principle. For an injury resulting from mere negligence, only compensation can be recovered. But, when the negligence is so gross as to show willfulness, wantonness, or recklessness, or a grossly careless disregard of the safety and welfare of the public, then punitive or exemplary damages may be awarded, in the sound discretion of the jury.

In *Day v. Woodworth*, 13 How. U. S., Justice GRIER said: "It is a well established principle of the common law, that in actions of trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff. . . . By the common, as well as by statute law, men are often punished for aggravated misconduct, or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured."

Vicksburg and Jackson Railroad v. Patton, 31 Miss. 156, was an action against the railroad company for killing cattle, the property of plaintiff, through the negligence and inattention of the employees of the railroad, the bad condition of the track and the rolling stock, and the insufficiency of the appliances for speedily stopping the train. There was a recovery beyond the value of the cattle killed. The court said: "The question of gross negligence, or wanton mischief, was distinctly submitted to the jury, and was a material part of the case; and whether we consider it with respect to the bad condition of the track, and the absence of appliances and fences necessary for its safe operation, or the unfitness and recklessness of the engineer, it is plain that the jury were at liberty from the evidence to find that the injury was occasioned, either by the gross neglect of the company, or the wanton mischief of the engineer. That was a question which they had the right to determine; . . . and it is immaterial whether the jury thought there was gross neglect, or willful mischief. The rules above stated apply equally to either state of the case, and would warrant the jury in finding exemplary damages, if the circumstances of neglect or aggravation tended to justify it, and they thought fit to

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award it." And the court quoted approvingly the language of Lord DENMAN in *Lynch v. Nurdin*, 1 Q. B. 29: "Between willful mischief, and gross negligence, the boundary line is hard to trace: I should rather say, impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice." See, also, *Sav. & Memphis R. R. Co. v. Shearer*, 58 Ala. 672, 680; *S. & N. R. Co. v. Sullivan*, 59 Ala. 272. We hold, there is no inflexible rule, which denies to plaintiffs, injured by the negligence of another, all right to claim punitive, exemplary, or vindictive damages, or smart money, as it is severally phrased in the law-books. It depends on the degree of the negligence, whether simple or gross; and the jury are judges of the degree, under proper instructions from the court; and the application of the rule must always depend, more or less, on the circumstances of the case.—*Shearman and Redf. on Neg.* § 600; 2 *Redf. on Railways*, § 199, par. 9; *Roberts v. Heim*, 27 Ala. 678.

4. The first charge asked by the defendant, was rightly refused. It assumes, as matter of law, that there can be no recovery beyond the actual injury sustained. It should have been left to the jury to say whether or not the negligence was gross. If it was, the jury, in their prudent discretion, were permitted to go beyond the boundary of mere compensation. The second and third charges asked assert the proposition, that the defendant corporation can not be held liable for the injury, unless knowledge of the defect in the bridge was brought home to it. This is not the rule. The corporation should have employed watchful diligence in keeping the bridge in proper repair; and is charged with a knowledge of every defect such diligence would have discovered. If the testimony be believed, the defect which caused the injury complained of, was plainly patent. Charges 2 and 3 were properly refused; and the general charge given by the court of its own motion is in accordance with the views expressed above, and is free from error.

5-6. Some of the answers of the witnesses are clumsily expressed; but, properly construed, we think they are free from error. We note the following: "In consequence of loss of time, and physical disability from the injuries, she had been prevented from earning money by her labor, and she had been injured fifty dollars within the four months next after the fall from the mare, by reason of and in consequence of the hurts caused by the fall from the mare." This is, in substance, an assertion that her labor, during that time, would have been worth fifty dollars.—*Parker v. Parker*, 33 Ala. 459. "The plaintiff seemed to be suffering during the

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time she stayed at Mrs. Griffin's." This was the day after the injury. "The plaintiff was not able to return from Mrs. Griffin's on Wednesday, to the residence of plaintiff." The fall and injury were on Tuesday. "That plaintiff was not able to use her arm a large part of the time for several months after she fell from the mare at the bridge." "That when the plaintiff returned from Mrs. Griffin's, on Thursday, after falling from the mare on Tuesday, the left wrist of plaintiff looked like the bone had slipped off the joint." "That when plaintiff returned from Mrs. Griffin's, she looked bad." "That plaintiff was disabled by the fall from the mare." All these are but facts, or, at most, conclusions of fact; awkwardly expressed sometimes, it is true; still, we find in them nothing to which a witness may not testify. *Bennett v. Fail*, 26 Ala. 605; *Wilkinson v. Mosely*, 30 Ala. 562; *Milton v. Rowland*, 11 Ala. 732; *Fountain v. Brown*, 38 Ala. 72; *Barker v. Coleman*, 35 Ala. 221; *Stone v. Watson*, 37 Ala. 279. "The true line of distinction is this: an inference, necessarily involving certain facts, may be stated without the facts, the inference being an equivalent of a specification of the facts: . . . In other words, when the opinion is the mere short-hand rendering of the facts, then the opinion can be given, subject to cross-examination as to the facts on which it is based."—Whar. Ev. § 510; *Raisler v. Springer*, 38 Ala. 703; *Avary v. Searcy*, 50 Ala. 54.

7-8. The general charge is made up of several propositions. There was a general exception to the whole of it, without indicating any particular part as objectionable. It is here urged, that one clause is faulty, in that it assumed the road crossing the railroad, on which the injury was suffered, was "a public dirt road," without submitting that inquiry to the jury. We incline to think this was a fact so proved as to be one of the conceded facts in the case, upon which the court was authorized to charge without hypothesis.—*Kirkland v. Oates*, 25 Ala. 465. But the exception was not sufficiently specific. It should have clearly pointed to the clause objected to, so that the court might have the opportunity to set itself right, or that opposing counsel might consent to its withdrawal, or modification.—1 Brick. Dig. 342, § 99; *Johnson v. McGehee*, 1 Ala. 186; *Irvin v. The State*, 50 Ala. 181; *Trenier v. Stewart*, Sup. Ct. U. S., October term, 1879.

If the damages in this case are excessive, the remedy is not with us. Complaint is frequently heard, that juries assess excessive damages against railroads. It is to be hoped such complaints are unfounded. While railroads should be managed with great skill and circumspection,

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because of the immense peril of their unskillful or negligent handling, they should not, for their derelictions, be mulcted more heavily than individuals would be for similar faults in matters of like magnitude.—See *Tanner v. Louisville & Nashville Railroad*, 60 Ala. 621.

The judgment is affirmed.

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Trespass for Injuries to Land by Mill-Dam.

1. *Opinion of witness ; when not admissible.*—In an action of trespass, to recover damages for injuries caused by the erection of a mill-dam, whereby a stream was diverted from its natural channel, and overflowed plaintiff's land, a witness can not be allowed to state that, *in his opinion*, plaintiff's land was not injured by the diversion and overflow.

APPEAL from the Circuit Court of Calhoun.

Tried before the Hon. W. L. WHITLOCK.

J. T. HEFLIN, for appellant.

TAUL BRADFORD, *contra*.

MANNING, J.—This action was brought to recover damages of appellees for building a mill-dam on the premises of plaintiff's intestate, whereby a change was effected in the flow of a natural water-course thereon; and the only error assigned is, the overruling by the presiding judge of objections on behalf of plaintiff to a question to one of the witnesses, and to his answer. The substance of the interrogatory was, whether or not the land had, in his opinion, been injured by the erection of said dam; to which he answered, that it had not.

There are certainly instances, and things, in which opinion is so intimately blended with, and a part of the fact to be proved, that the opinion cannot be excluded without substantially excluding the fact also, a fact which may be an important element in the formation of the verdict. This is true when the testimony relates to what are sometimes called "conclusions of fact," such as identity, distance, velocity, duration, &c.; and in not a few other instances. See Wharton on Evidence, §§ 509 *et seq.* But "the general rule is, that witnesses must depose to facts, and cannot be

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allowed to give their opinions, founded on these facts, or the inferences or deductions, which they have drawn from them." *Montgomery & W. P. R. R. Co. v. Varner*, 19 Ala. 186. The reason is obvious: the verdict should express the jury's own independent conclusion from the facts and circumstances in evidence, and not be the echo of the opinions of witnesses, perhaps not unbiased.

Whether, in this case, injury had been done, and the extent of it, were questions for the jury to decide, and not the witness. He might have testified, whether or not there was any overflow, and the extent of it, if there was; what was the condition of the land when overflowed; whether it was arable or not; what was its value; and of such other particulars and facts as would enable the jury to form a correct opinion of their own, to be embodied in their verdict. They have nothing to do, in such a case as this, with the mere opinion of a witness in respect of the *quantum* of damages. It is the office of the latter to inform the jury what the facts and circumstances of the case to be decided are; and of the jury, to determine what effect and influence they are entitled to in the formation of the verdict to be rendered. It was, therefore, an error on the part of the judge to overrule the objections of appellant to the opinion of the witness; for which, the judgment of the Circuit Court must be reversed, and the cause remanded.

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Action against Partners, on Partnership Debt.

1. *Partnership debts; liability of partners personally.*—Partnership debts are also the debts of each partner personally; and when they are evidenced by promise in writing (Code, § 2905), an action on them may be maintained against the partners either jointly or severally.

2. *Action against partnership, or partners individually; form of judgment and execution.*—When an action is brought against a partnership in its firm name, not naming the individual partners who compose it, and judgment is rendered against it, an execution thereon can only be levied on the partnership property (Code, § 2904); but, when the action is against the partners individually, though they are described as partners composing the firm, execution is properly issued against them individually.

APPEAL from the Circuit Court of DeKalb.

Tried before the Hon. LOUIS WYETH.

The record in this case shows that, on the 1st February, 1875, an action was instituted in said court by Henry B.

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Campbell, against William J. Haralson and Terrence Reynolds, "partners under the name and style of W. J. Haralson & Co.," founded on a "due-bill executed by them on the 8th day of January, 1874, and payable to plaintiff"; that judgment was rendered in this action, on the 24th September, 1877, in favor of the plaintiff, for \$245.46, damages assessed by the jury; that an execution was issued on this judgment, on the 20th November, 1877, commanding the sheriff to make the money out of the goods and chattels, lands and tenements, of William J. Haralson and Terrence Reynolds; that said Haralson thereupon filed his petition for the *supersedas* of said execution, because it was issued against himself and Reynolds individually, instead of the firm of W. J. Haralson & Co.; and that the circuit judge refused to supersede or quash the execution, and dismissed the petition. The appeal is sued out from the original judgment. The errors assigned are, the refusal to quash and supersede the execution, and the rendition of the original judgment.

BRAGG & THORINGTON, for appellants.

L. A. DOBBS, *contra*.

STONE, J.—Partnership debts and liabilities, except in limited partnerships, are equally the debts of the firm and each member thereof; and the individual property of the several members, as well as the partnership property, may be taken in execution for the payment of such partnership debt. Partnership debts are joint and several, if evidenced by promise in writing, and may be sued on against the members jointly or severally.—Code of 1876, § 2905; *Emanuel v. Bird*, 19 Ala. 596; *Waldron v. Simmons*, 28 Ala. 6-9; *Van Wagner v. Chapman*, 29 Ala. 172. A modification of this principle exists, in cases of bankruptcy and insolvent administration, and a marshalling of assets will sometimes be decreed; but that doctrine has no application to this case, as no bankruptcy or insolvency is averred.

The suit and judgment in the present case are against W. J. Haralson and Terrence Reynolds, defendants, under the firm name of W. J. Haralson & Co. The mandate of the execution is, that the sheriff cause the amount of the judgment to be made "of the goods and chattels, lands and tenements, of William J. Haralson and Terrence Reynolds." There was a motion in the court below to quash the execution, because it directed the money to be made out of the individual effects of the defendants, and not out of the partnership property.

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The Circuit Court overruled the motion. This suit is not governed by section 2904 of the Code. That section contemplates a suit against the partnership, in its partnership name merely, without naming the individual members composing the firm. In this case, the individuals are named, and sued as such. The individual property of each partner is liable to seizure in satisfaction of this judgment.

We have said this much, because the assignments of error show that the intention of the appeal was to obtain a review of the judgment overruling the motion to quash the execution. The appeal bond describes and supersedes the principal judgment rendered in the cause at the September term, 1877. There does not appear to be any error in the record of that judgment. None has been pointed out, and we have found none.

The judgment is affirmed.

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Trover for Conversion of Exempt Personal Property.

1. *When trover lies.*—To maintain the action of trover, the plaintiff must have the legal title, general or special, to the chattel sued for, and the right to its immediate possession. A partial or equitable interest, a lien not created by a conveyance of the legal title, or by delivery of possession, or a right to a part of an unsevered bulk, will not support the action.

2. *Same; exemption of personal property for benefit of decedent's widow.*—The act "to regulate property exempt from sale for the payment of debts," approved April 23, 1873 (Sess. Acts 1872-3, p. 64), exempted from liability for the debts of the deceased husband, in favor of his surviving widow, "personal property to the value of one thousand dollars" belonging to his estate; and this right accrued to the widow on the death of the husband, although she only survived him a few days. But the statute did not vest in her the title to any specific property, as so exempt: until a selection was made by her, the personal representative, or commissioners appointed by the judge of probate, she had no title to any specific property, for which she could maintain trover against the husband's administrator; nor could her personal representative maintain such action.

APPEAL from the Circuit Court of Monroe.

Tried before the Hon. JOHN K. HENRY.

J. W. POSEY, for the appellant, cited *Rottenbury v. Pipes*, 53 Ala. 450; *McCuan v. Tanner*, 54 Ala. 85; *Alabama Conference v. Vaughan*, 54 Ala. 445; 7 U. S. Digest, 267, 277, and cases there cited; Thompson on Homesteads and Exemptions, § 943, and authorities there referred to.

[Tucker v. Henderson's Adm'r.]

C. J. TORREY, *contra*, cited *Leslie v. Tucker*, 57 Ala. 483 ; *Ex parte Reavis*, 50 Ala. 210; *York v. York*, 38 Illinois, 522 ; *Hastings v. Myers*, 21 Mo. 519 ; *Taylor v. Taylor*, 53 Ala. 135 ; Thompson on Homesteads and Exemptions, §§ 734, 898.

STONE, J.—The present suit is an action of trover, brought by the administrator of a surviving widow, against the administrator of her husband's estate, and seeks to recover for the conversion of the personal effects of the deceased husband, of the value of one thousand dollars, claimed to be exempt from the payment of debts, under the act "To regulate property exempted from sale for the payment of debts," approved April 23, 1873.—Pamph. Acts, page 64. Mr. Henderson, the husband, died October 14th, 1874, and Mrs. Henderson, the widow, died October 18th, 1874—four days afterwards. They left no children, or lineal descendants. Administration was appointed on the estate of Mr. Henderson soon after his death ; and there was returned an inventory and appraisement of the personal estate and effects, showing a valuation of something over one thousand dollars. An order to sell these personal effects was applied for and obtained ; and soon afterwards the administrator of Henderson sold the personal chattels for cash. The amount of this sale, together with the sum realized from the credits to which he succeeded as administrator, was less than one thousand dollars. No steps were taken, either by Mrs. Henderson, the widow, or by her administrator, or by the administrator of Mr. Henderson, to select and set apart for the widow the one thousand dollars worth of personal property exempt from administration, until the present claim was asserted. This money, proceeds of sale and collections, was disbursed, soon afterwards, in payment of Henderson's debts, before any claim was asserted to it by the widow, or her administrator. Henderson's administrator was appointed November 2d ; the order of sale granted November the 9th, and the sale of the personal property made December 1st, 1874. The entire sales and collections amounted to seven hundred and eleven dollars.

On the 8th day of December, 1874, administration was taken out on the estate of Mrs. Henderson ; but the administratrix "never made any demand, or instituted or set up any claim to any of the personal property left by said Willis R. Henderson, deceased, as exempt to her intestate from the debts of said W. R. Henderson, deceased, either in said Probate Court, or otherwise." On the 11th December, 1875, the administratrix of Mrs. Henderson resigned her administration, and made her final settlement in February, 1876.

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In June, 1876, Leslie, general administrator for the county, and plaintiff in this action, was appointed administrator *de bonis non* of Mrs. Henderson's estate, and afterwards "made a demand of said James H. Tucker, administrator aforesaid, for one thousand dollars worth of personal property left by said decedent, W. R. Henderson, as exempt to him, Leslie, as the administrator of Mary J. Henderson, deceased, she not having received the same, or any part thereof, during her life." He failed to obtain the property, or its proceeds; Tucker having sold the property, and applied the proceeds to Mr. Henderson's debts. Leslie then applied for, and obtained from the Probate Court, the appointment of three commissioners to select and set off to his intestate's estate one thousand dollars worth of personal property of her husband's estate, as exempt from administration, for her benefit as surviving widow. In February, 1877, the commissioners applied to Tucker, as administrator, for property from which to make the selection and allotment, and failed to obtain any property, or the proceeds thereof; he having, as before stated, sold all the personal property, and disbursed the proceeds. The present action of trover was brought in March, 1877; and the question arises, has the plaintiff shown such title and right to the possession as will maintain the action?

1. To maintain the action of trover, the plaintiff must have the legal title, general or special, of the property sued for, and the right to the immediate possession of *the thing* alleged to have been converted.—2 Greenl. Ev. § 636; *Stodder v. Grant*, 28 Ala. 416; *McNutt v. King*, 59 Ala. 597. A partial or equitable interest, a lien not created by a conveyance of the legal title, or by delivery of possession, or a right to a part of an unsevered bulk, does not confer a right to the immediate possession, and will not support the action of trover.—*Magee v. Billingsley*, 3 Ala. 679.

2. The right of the plaintiff to maintain the present action depends on the proper construction of sections 3 and 13 of the act approved April 23, 1873.—Pamph. Acts, 64. Section 3 declares, that "personal property, to the value of one thousand dollars, of any resident of this State, after his death, shall be exempt from the payment of debts; *Provided*, such decedent leaves surviving him a widow or child." The language of section 13 is, "That whenever an executor or administrator makes out an inventory of the estate of any decedent, who left surviving him a widow or minor child, it shall be his duty to permit said widow, or the guardian of such child or children, if there be no widow, or she does not act, to select the property exempt from administration for the payment of debts; and if neither the widow (n)or guar-

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dian make such selection, then three disinterested persons, to be selected by the judge of probate, must make such selection, and set apart the same; and the same must be appraised by the appraiser (s?), and the appraisement thereof returned to the Probate Court, with the appraisement of the residue of the estate. Such property vests in such widow, and child or children, share and share alike."

Mr. Henderson left a widow, but no child or children, surviving him. It is clear that the widow, surviving her husband as she did, was entitled to have set apart for her this thousand dollars of personal property, exempt from administration for the payment of her deceased husband's debts. She comes directly within the letter of the statute, and the fact that she survived her husband only four days can not vary the question. But we do not think the statute vested the title in her by its unaided force. Either she, or her personal representative, must have made the selection, or commissioners, appointed by the judge of probate, must have done so, before the right to the possession of specific property could vest in her, or her estate. It was possibly the duty of Mr. Henderson's administrator, to apply for, and have commissioners appointed for the purpose, when the widow and her administrator failed to make the selection; but we leave that question open, until its decision becomes necessary. Till the selection was made, in one of the modes pointed out in the 13th section of the act, no such title and right to the possession vested in Mrs. Henderson, or her administrator, as will maintain the action of trover.—See *Ex parte Reavis*, 50 Ala. 210.

It will be observed, that this is not an action for money had and received. Had it been, we would have felt it our duty to consider the case of *Hastings v. Myers*, 21 Mo. 519, as bearing on it. Neither is it a case of specific property exempt from administration, which requires no act to vest the title in the widow.—See *Carter v. Hinkle*, 13 Ala. 529; *York v. York*, 38 Ill. 522. We base our opinion on the nature of the claim—a right to elect, under the provisions of the statute—which, as we have shown, fails to give a right to specific property, until one of the modes of selection has been pursued.

The rulings of the Circuit Court are not in harmony with our views; and its judgment is reversed, and the cause remanded.

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Statutory Action in Nature of Ejectment.

1. *Sufficiency of certified transcript.*—A transcript from the records of the Circuit Court, duly certified by the clerk, in his official capacity, to contain a full, true, and complete copy of the record, the minute-entries, the execution docket, and the entries thereon, together with all the papers on file pertaining to the particular case, is admissible as evidence, although it does not show the time and place at which the court was held.

2. *Variance between judgment and execution.*—In a certified transcript of a judgment and execution thereon, if the judgment is for \$752, and the execution purports to have been issued on a judgment for \$752.68, the variance is immaterial, and furnishes no ground of objection to the transcript as evidence.

3. *Title of purchaser at sheriff's sale under execution; proof of outstanding title by defendant.*—In ejectment, or the corresponding statutory action, by a purchaser at sheriff's sale under execution on a judgment at law, he must prove that the defendant in execution had such an estate or interest in the lands, at the time of the levy, as was subject to levy and sale; and the defendant in the action, although he was also the defendant in execution, may defeat a recovery by showing that, notwithstanding his possession at the time of the levy and sale, he did not have such an interest as was subject to the execution.

4. *Execution and attestation of deed.*—When the grantor subscribes his own name to a conveyance, the attestation of one witness only is necessary to its valid execution (Code, § 2145); and if a person who is present writes his name as a subscribing witness, under the proper attestation clause, with the knowledge of the parties, and without objection from them, though without their request, and the deed is thereupon delivered and accepted, this is a sufficient attestation; and the validity of the conveyance, thus executed, attested, and delivered, is not affected by an informal certificate of acknowledgment, subsequently written on it by the person who had signed his name as attesting witness.

5. *Description of lands in conveyance; parol evidence in aid of.*—In a conveyance of lands, if the description of the premises is so inaccurate, vague, and indefinite, that their identity is wholly uncertain, the deed is void, and parol evidence can not be received to cure the deficiency; but, before pronouncing the deed void on its face, the court should receive parol evidence of the circumstances surrounding the parties at the time, having relation to the subject-matter of the deed, and interpret the words of the deed in the light of those circumstances, if thereby the indefiniteness and uncertainty may be removed.

6. *Same.*—The rule is of very general application, that if the premises intended to be conveyed clearly appear from any part of the description in the deed, the conveyance will not be defeated because other circumstances of description are added, which are inapplicable, or incapable of a definite application: the latter will be rejected, and full effect given to the former words.

7. *Plat and survey by county surveyor.*—A survey of lands, made by a county surveyor without notice to the party in adverse interest, is not legal evidence against him (Code, § 688); but it would be admissible evidence in connection with the testimony of the surveyor himself as to its correctness.

APPEAL from the Circuit Court of Clay.

Tried before the Hon. JOHN HENDERSON.

This action was brought by Daniel C. Pearce, against Ben-

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jamin A. Clements, to recover a certain tract of land, with damages for its detention. The record does not show when the action was commenced. An amended complaint was filed on the 2d March, 1876, in which the lands sued for were thus described: "The east half of section twenty-nine (29); the east half of the north-west quarter, and the west half of the south-west quarter, and the north-east quarter of the south-west quarter of said section (29); also, the east half of the south-east quarter, and the south-west quarter of the south-east quarter of section twenty (20); also, the south-west quarter of the south-west quarter of section twenty-one (21); all lying and being in township twenty-one (21), range eight (8), and situated in said county of Clay." The defendant entered a disclaimer as to a part of the lands, particularly described, and pleaded not guilty as to the residue; and as to the latter portion, he "disclaimed the possession as being in him in his own right, and said that his only possession of said land was as the husband of Tempy Clements, she being his wife, and the owner of said lands as her statutory separate estate, she being in the actual occupancy and possession of said land, which is managed and controlled by this defendant as her trustee."

The plaintiff claimed title under a purchase at sheriff's sale, under execution on a judgment which he had recovered against said defendant and one Prosser L. Clements; and the defendant held possession, in right of his wife, under a deed which he had executed to her, as hereinafter stated, by the name of Tempy Farrell, prior to his marriage with her, and prior to the rendition of the plaintiff's judgment against him. On the trial, as the bill of exceptions states, the plaintiff offered in evidence a certified copy of his judgment against the defendant, with the execution thereon, &c. This transcript showed that the plaintiff's action in that case was commenced on the 1st April, 1862; that judgment by *nil dicit* was rendered on the 26th October, 1867; that an execution was issued on this judgment on the 16th December, 1868, which was returned "No property found"; that an *alias* was issued on the 12th April, 1869, which was levied on the lands in controversy, and they were sold under the levy, on the first Monday in August, 1869, and purchased by the plaintiff; and that another execution was issued on the 5th September, 1871, and levied on the lands by the sheriff of Clay county, and they were sold under this levy on the 6th November, 1871, and bought by the plaintiff. The caption of this transcript, and the clerk's certificate appended to it, were in the following words:

"The State of Alabama, Talladega County: Be it remem-

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bered that, at a Circuit Court begun and held on the second Monday after the fourth Monday in September, 1867, it being the 7th day of October, present and presiding Hon. JOHN HENDERSON, judge of the tenth judicial circuit of the State of Alabama, the following judgments were rendered, and proceedings had."

"The State of Alabama, Talladega county: I, John A. Huey, clerk of the said Circuit Court, do hereby certify, that the foregoing pages, numbered from one to thirteen, both inclusive, contain a full, true, and complete transcript of the record, the minute-entries, the execution docket, and the entries thereon, together with all the papers of file in my office, in the case of Daniel C. Pearce against Prosser L. Clements and Benjamin A. Clements. In witness whereof, I have hereunto set my hand, and affixed my seal of office, this 22d August, 1876."

"The defendant objected to the admission of this transcript as evidence, on the following grounds: 1. It does not appear from the transcript where the court was held that rendered the judgment set out in the transcript. 2. The judgment set out in the transcript is for \$752, and the execution issued from said judgment, including the execution under which plaintiff claims to have purchased, recites that it issued on a judgment for \$752.68. 3. The certificate of the clerk, authenticating said transcript, is defective in this: it does not purport to be the certificate, or the official act, of the clerk of the Circuit Court of Talladega county, Alabama. It does not appear from said certificate that the transcript is copied from the record, or complete record, in the case of Daniel C. Pearce against Prosser L. and Benjamin A. Clements, that are of record, or on file, in the Circuit Court of Talladega county. It does not appear from the certificate that the transcript is copied from the record, the minute-entries, the execution docket, and the entries thereon, together with all the papers of file in the Circuit Court of Talladega county, in the case of Pearce v. Clements and Clements, as the same are of record, or on file, or copied correctly from the record or files of said court in said cause." The court overruled these objections, and admitted the transcript; and the defendant excepted. The plaintiff then offered in evidence the sheriff's deed to him for the lands, which was dated the 7th November, 1871, and recited that a judgment was rendered by the Circuit Court of Talladega county, on the 26th October, 1867, in favor of D. C. Pearce against Prosser L. and Benjamin A. Clements, for \$752.68; that an execution was issued on this judgment on the 5th September, 1871, and was levied on the lands on the 21st

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September, 1871, by the sheriff of Clay county; and that the lands were sold under this levy on the 6th November, 1871, and were bought at the sale by the said Daniel C. Pearce. "The defendant objected to said deed, on the ground that the transcript above set out did not show any authority in said sheriff to levy or sell said lands." The court overruled the objection, and the defendant excepted. "The plaintiff offered evidence, also, that the defendant went into the possession of the land sued for about 1858, and had remained in the possession of it up to the time of the trial, except about one year (from the spring of 1864 to the spring of 1865), when he was in the military service of the Confederate States; also, the value of the rents each year, from 1874 to 1878."

The defendant offered in evidence a deed from himself to Tempy Farrell for the lands, which was dated the 2d May, 1864, and recited a consideration of \$5,000 in hand paid; and it was signed by the grantor, with his seal annexed, and purported to be "signed, sealed, and delivered in presence of *Merritt Street, J. P.*"

The lands conveyed by the said deed were thus described: "A certain tract or parcel of land in the county of Talladega, State of Alabama—Lot No. 1312, a part of the west half of the south-east quarter; a part of No. 4100; the east half of the south-east quarter; a part of the east half of the north-west quarter; a part of the same described quarter; all lying west of Eniptochopko creek, to the agreed line between John Kerley and John W. Bishop, belonging to the said B. A. Clements; in section twenty-nine (29), township twenty-one (21), of range eight (8). Also, No. 4101, the east half of the north-east quarter; No. 1310, the west half of the north-east quarter; all in section twenty-one (21), township twenty-one (21), range eight (8). Also, the east half of No. 4102; the east half of the south-east quarter of No. 4105; the south-west quarter of south-east quarter of section twenty, township twenty-one, range eight; No. 6353; the south-west quarter of the south-west quarter of section twenty-one, township twenty-one, range eight. Also, a portion of the north-east quarter of the south-west quarter of section twenty-nine, township twenty-one, range eight; lying east of an agreed line, running in a north-western direction, as an agreed line between John Kerley and John W. Bishop. Containing in all four hundred and seventy-five acres, more or less, in the Coosa land district of Alabama; being the entire tract of land purchased by said B. A. Clements of William L. Kerley."

Appended to this deed was a certificate in these words:

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"I, Merritt Street, an acting justice of the peace in and for the county and State aforesaid, hereby certify, that Benjamin A. Clements, who is well known, and whose genuine signature appears to the foregoing conveyance, did voluntarily execute the same in my presence, after fully knowing the contents of the same, on the day the same bears date. Given under my hand, this 28th day of February, 1865."

"To prove the execution of this deed, the defendant offered said Merritt Street as a witness, who testified, in substance, as follows: 'I wrote the deed at the house of Benjamin A. Clements, at the time it bears date. Dr. J. W. King had come there to witness the deed. It took some time to get up the numbers of the land, and to write the deed; and when the deed was completed, it was late at night, and Dr. King was asleep. I suggested that he was tired and asleep, and it was not necessary to awake him; that I was an officer, and my signature to it would be sufficient. I saw Clements sign the deed, and I signed it, and saw Clements deliver it to Tempy Farrell, who was present. I signed it officially.' (On cross-examination.) 'I was not called on by any one to witness the deed. Dr. King was there to witness it, but he was asleep, and I thought my signing it as an officer would be sufficient. I wrote the acknowledgment of the deed. I do not remember where I was when it was done, nor who was present, nor who brought it to me.' The plaintiff objected to the admission of this deed as evidence, on the following grounds: 1. Because, in this case, the defendant can not set up an outstanding title. 2. Because said deed is a nullity, being neither acknowledged, nor witnessed according to law. 3. Because it does not describe or convey the lands in controversy. 4. The description of the land is so defective and uncertain, that parol evidence can not be introduced for the purpose of showing the boundary of the land, or any other description of it. The court sustained the objections, and excluded the deed; to which the defendant excepted."

"The defendant stated that this deed was offered in evidence to show that the legal title of the land sued for was in Tempy Farrell, now Clements, at and before the rendition of the judgment under which the execution issued and the land was sold, and was offered in connection with the following evidence: 1. A plat and diagram, with the certificate thereof, made by J. D. Barron, the county surveyor of Clay county," which is then copied in the bill of exceptions. "The plaintiff objected to the plat and diagram, as evidence to the jury, because the same is illegal, and because he had not received any notice of the survey, or that it was going to be made. The court ruled, that if these objections were well

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taken, it could be offered to the court, for the purpose of showing the competency of other evidence, which the defendant announced that he would offer to make the said deed to Farrell competent. The defendant proposed to prove, that John W. Bishop was in possession of all the lands mentioned in the complaint forty years ago, and was the owner of the lands adjoining those described in the complaint on the western and southern sides of said lands; and that said Bishop, about the year 1850, sold to John Kerley the lands described in the plat and diagram made by Barron, in sections 20, 21, and 29, township 21, range 8, east; and that a dividing line was established by said Bishop and said Kerley, ascertaining the boundary between the lands sold by Bishop to Kerley, and the lands owned by Bishop west of said line. Said line commenced at a point on the section line dividing sections 21 and 29, near the north-west corner of section 29, and running thence in a south-easterly direction, crossing Eniptochopko creek twice, on the north-west quarter of the north-west quarter of section 29, and in the same direction to a point on said creek in the north-east quarter of the south-east quarter of said section. The initial point of said line is marked *D*, and the terminal point *C*, on said creek, on the survey and diagram offered in evidence; but the original location of this line, *near* (?) the initial and terminal points of said line, were not proved, nor otherwise shown, than by the recitals in deeds, and the plat and diagram offered in evidence. The lands on the west of the said agreed boundary have been in the possession of said Bishop, and those claiming under him, for forty years past, and for fifteen years past in the possession of Merritt Street. The lands described in the complaint, and south of Eniptochopko creek, were in the possession of John W. Bishop, and those claiming under him, down to 1856; and have been, from 1858 to this date, in the possession of John Lucius and Merritt Street. About 1850, John Kerley sold to William L. Kerley the lands described in the said deed from B. A. Clements to Tempy Farrell; and he went into possession of the same, and occupied and cultivated them as his own until December, 1858, when he sold and conveyed the same to said B. A. Clements, who went into possession of them." (The deed from said Kerley to Clements is here set out.)

"The defendant testified as follows: 'I purchased the land in controversy, in December, 1858, from William L. Kerley, and went into the possession of the same. I was never in possession, nor claimed any land in section 29, other than those described in Kerley's deed to me. The remainder of said section is in the possession of Street and Lucius. On

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the 2d May, 1864, I was in possession of the lands that I had purchased from Kerley; and on that day I sold them to Tempy Farrell, and executed and delivered to her the deed in evidence; and on the next day I entered the military service of the Confederate States, and started to Virginia. Tempy Farrell was at my house the day and night on which the deed was executed. I put her in possession of the lands, and she has been in possession of them ever since, cultivating them, and claiming them as hers. I was absent from Alabama, from May 3, 1864, to May 17, 1865, and was not in Alabama on the 28th February, 1865. When I returned, on the 17th May, 1865, I went to Tempy Farrell's and remained there that night. I was married to her on the 19th May, 1865. I stayed [at her house?] most of the time after my return, on the 11th May, to the 19th, when we were married. We have resided on said land together, from the time of our marriage until now, and they have been occupied and cultivated as my wife's separate estate, and have been so treated and considered since May 2, 1864."

"On the foregoing evidence, the defendant again offered in evidence the said deed from B. A. Clements to Tempy Farrell, for the purpose stated by the defendant; and the plaintiff renewed his objections, on the grounds heretofore stated by him. The court sustained the plaintiff's objections, and the defendant excepted."

The several rulings of the court on the evidence to which, as above stated, exceptions were reserved by the defendant, with other matters, are now assigned as error.

JOHN T. HEFLIN, for the appellant.

PARSONS & PARSONS, *contra*. (No briefs on file.)

BRICKELL, C. J.—The objections made to the introduction of the transcript of the record of the judgment and proceedings thereon, from the Circuit Court of Talladega county, were properly overruled. It was certified by the clerk, in his official capacity, to be a *full, true, and complete transcript of the record, the minute-entries, the execution docket, and the entries thereon, together with all the papers of file, pertaining to the particular cause. Time and place are constituents of the jurisdiction of courts.* The Circuit Court of Talladega, or of any other county, can not be held at any other place than that the law appoints, nor at any other time than is prescribed by law. If it appeared affirmatively that its sittings were elsewhere, or at some time not authorized, its proceedings would be *coram non judice*, and would be repu-

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diated, whether assailed directly, or introduced as the foundation of a right, or a muniment of title to property. It is a court of general jurisdiction, and all reasonable intendments are made to support its judgments, whether they are directly or collaterally assailed; and the mere silence of the record, as to the time and place of its sitting, would be supplied by intendment. The record can not, however, be regarded as silent; it affirms, in the caption, that it is the record of a Circuit Court, begun and held at the time appointed for holding the Circuit Court of Talladega county; and in the margin, to which reference must be made, it is entitled: "*The State of Alabama, Talladega county.*"

2. The slight variance between the amount of the judgment, and the amount specified in the execution issuing on it, was immaterial.

3. A plaintiff in ejectment must recover on the strength of his own title. Claiming title under a purchase at sheriff's sale, made under execution issuing on a judgment of a court of law, he must prove that the defendant in the judgment, to whose title he succeeds, had an interest or estate in the lands, which was subject to levy and sale. The recent possession of the defendant, accompanied by acts of ownership, is *prima facie* evidence of such an estate or interest. To defeat a recovery, the defendant may show that, notwithstanding such possession, the defendant in execution had no such interest or estate; and it is the right of a defendant in ejectment, or in the corresponding statutory real action, in all cases, to show an outstanding legal title in another; unless he is estopped, because of some act done by him, or because of some relation existing between him and the plaintiff, or between the plaintiff and those with whom he is privy in estate or in possession.—*McKinney v. Davis*, 5 Ala. 729; *Elmore v. Harris*, 13 Ala. 360; *Cook v. Webb*, 18 Ala. 810; *King v. Stevens*, *Id.* 475. A defendant in execution, when sued by a purchaser at a sheriff's sale, is not an exception to the rule. There is no relation existing between them, which estops him from showing that by the sale the purchaser acquired no title; and this is shown, whenever it appears that he was without interest or estate in the lands which was subject to levy and sale, and that his possession was a bare occupancy by the permission of another, in whom the legal estate resided; or that his possession was in conjunction with the possession of the true owner, the law then referring the possession to the title. The first ground of objection made by the appellee to the introduction of the deed from the appellant to Farrell, was not, consequently, well taken.

4. The second ground of objection was also untenable.

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When the grantor subscribes his name, being able to write, to a conveyance, the attestation of but one witness is necessary to its valid execution.—Code of 1876, § 2145. The conveyance was attested by Merritt, who wrote his name beneath the words, “*signed, sealed and delivered in presence of,*” opposite the subscription of the grantor, in his presence and that of the grantee, with their knowledge, and without dissent from them, though without a request from them, in words, that he should attest its execution. The deed was then delivered to the grantee; and the delivery and acceptance is an assent to the attestation, equivalent to an express precedent request that he should attest. The informal certificate of acknowledgment made by Merritt subsequently, untrue in its statements, did not affect the validity of the deed as an executed conveyance.

5. Nor should the remaining ground of objection have been sustained. A conveyance of lands, so inaccurate, vague and indefinite in its description of the premises, as to render their identity wholly uncertain, it may be conceded is void; and that parol evidence of the intention of the parties can not be received to cure the deficiency.—1 Green. Ev. § 301. But, before pronouncing it void for uncertainty, the court is bound to receive parol evidence of the circumstances surrounding the grantor, which have relation to the subject-matter, when the conveyance was executed, and interpret his words in the light of such circumstances; and it is only after a comparison of these circumstances with the description of the premises in the conveyance, and it is found unintelligible, that the conveyance can be pronounced void for uncertainty.—*Pollard v. Maddox*, 28 Ala. 321. The duty of the court is to ascertain, if possible, the intention of the grantor, and to give it effect, so far as the law will permit. In grants and conveyances there is often an incongruity between courses and distances as expressed, and monuments, or natural objects, capable of clear, accurate designation and description, such as marked trees, mountains, water-courses; and these control, because the natural presumption is, that the parties are less liable to be mistaken about them, than about courses or distances.—*McIver v. Walker*, 9 Cranch, 179.

The lands are doubtless inaccurately described, if we look only to the numbers and quantity as collected from the government survey, by which to identify them. This description, however, is accompanied with the further description, that a part of them lies west of *Eniptochopko Creek*, extending to the agreed line between John Kerley and John W. Bishop, belonging to the grantor; a further part of them lying east of that agreed line, and that the whole tract conveyed

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was purchased by the grantor of William L. Kerley. The intent to pass the lines lying east of the agreed line, and west of the creek to that line, and the entire tract purchased by the grantor of Kerley, is clearly expressed. Parol evidence of the exact situation and location of the lands, and of their identity, as shown by these descriptions, was admissible, to relieve and cure whatever indefiniteness and discrepancy there may be in the other descriptions.—*Saltonstall v. Riley*, 28 Ala. 164.

6. The rule is of very general application, that if, from any part of the description, the premises intended to be conveyed clearly appear, the conveyance will not be defeated, because other circumstances of description are added, which are inapplicable, or incapable of a definite application. Such circumstances are rejected, and the maxim, *falsa demonstratio non nocet*, is applied.—3 Washb. Real Prop. 344-47. The conveyance to Farrell ought to have been received in evidence; and parol evidence, showing that the lands sought to be recovered, were the lands the grantor had purchased of Kerley, situate in reference to the agreed line between Bishop and Kerley, gave application to the description in the conveyance, identified them as the lands passing by it, and ought also to have been received.

7. The survey of the lands made by Barron, the county surveyor, notice of it not having been given to the appellee, was not, of itself, legal evidence. But it would be admissible, in connection with the evidence of the surveyor.—*Nolin v. Parmer*, 21 Ala. 66; *Bridges v. McClendon*, 56 Ala. 327.

For the error in excluding this deed to Farrell, the judgment must be reversed, and the cause remanded.

Davis's Adm'rs v. Davis.

Detinue by Husband's Administrators, against Widow, for Personal Property claimed as Exempt.

1. *Exemptions for benefit of decedent's family; governed by what law.*—Exemptions for the benefit of a decedent's surviving widow or family are governed by the law which was of force at the time of his death.

2. *Same; title of widow.*—The act approved April 23, 1873, (Sess. Acts 1872-3, pp. 64-69), by its 6th section, exempted from liability to debts or administration, for the benefit of the decedent's widow, or minor child or children, besides other things, personal property which was supposed to be necessary for present subsistence, use, and consumption, and books, family por-

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traits, &c., which had an especial value to the family; and as to these articles, the right of exemption is not dependent on the solvency or insolvency of the estate, nor did any title to them pass to the personal representative.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. JAMES E. COBB.

This action was brought by the administrators of the estate of Bennett Davis, deceased, against Mrs. Eliza T. Davis, his surviving widow, to recover certain articles of household and kitchen furniture, and other things particularly enumerated in the complaint; and was commenced on the 26th May, 1877. The defendant pleaded "the general issue, in short by consent"; and issue was joined on that plea. On the trial, the following facts were agreed on: "That the property sued for in this action belonged to the estate of Bennett Davis, deceased, at the time of his death, which occurred on the 18th October, 1876. That plaintiffs have been appointed administrators, with the will annexed, of the estate of said Davis. That said estate is solvent, and it is not necessary to sell the property of said estate to pay the debts. That the defendant is the widow of said Davis, and has filed her claim and affidavit, alleging that said property is exempt to her under the statute of Alabama in force at the death of said Davis, and under the act of October, 1876-7, exempting property from administration for the payment of debts. That the property is of the value at which it was appraised by the appraisers of said estate. That said estate has not been finally administered and settled. That the defendant had the possession of the same at the commencement of the suit. That there are no minor children, and that the widow duly dissented from the will." On these facts, the court charged the jury, if they believed the evidence, they must find for the defendant. This charge, to which the plaintiffs duly excepted, is now assigned as error.

WILSON & WILSON, with WATTS & SONS, for appellants.

BRICKELL, C. J.—The constitution of 1868, as does the present constitution, exempted from liability to debts, personal property, to be selected by the owner, not exceeding in value one thousand dollars. The act of February 8th, 1872 (Pamph. Acts 1871-2, p. 9), on the death of the owner, leaving a widow, or a minor child, exempted from administration, for the use and benefit of such widow, or minor child, personal property to the value of one thousand dollars. This act was repealed by the act of April 23d, 1873 (Pamph. Acts 1872-3, pp. 64-9), which exempted from administration, when

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the owner died leaving a widow, or a minor child or children, not only the personal property exempt from liability for debts, but other personal property, which was supposed necessary for present subsistence, use, and consumption, and books, family portraits, &c., which to the family had an especial value. This is the statute of force at the death of the testator, and is the law which governs and controls the rights of the appellee as to the exemptions claimed by her. *Taylor v. Pettus*, 52 Ala. 287. Her right is not dependent on the solvency or insolvency of the estate. The title to the property exempt did not, in any event, vest in the personal representative. His duty, in reference to it, was to take care that it was separated from the property to which his title extended, and secured to the widow, or minor children. Not having title to, or the right of possession of the property sued for, as against the appellee, the widow of the testator, the appellants were not entitled to recover in this action.

The judgment is affirmed.

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Statutory Action in Nature of Ejectment.

1. *Error without injury in rulings against plaintiff*—When the record shows, affirmatively and clearly, that the plaintiff never can recover in the action, this court will not reverse at his instance, on account of any erroneous rulings adverse to him, since they can work no injury; but this rule will not be applied, when the bill of exceptions does not purport to set out all the evidence, although the plaintiff's evidence, as therein set out, is indefinite and insufficient.

2. *What title will support action*.—An equitable title will not support ejectment, nor the corresponding statutory action: the plaintiff can not recover on proof of a purchase at a sale made by an assignee in bankruptcy, not followed by a conveyance; nor as the assignee of a mortgage, without showing a deed from the mortgagee, either indorsed on the mortgage, or by a separate instrument.

3. *Homestead exemption of bankrupt*.—Since the title to the exempt property of a bankrupt does not vest in his assignee (Rev. Stat. U. S. § 5045), it would seem that he is not entitled to a conveyance of his homestead by the assignee.

4. *Same; admissibility of record or judgment as evidence against third person*. In ejectment by a purchaser at a sale made by an assignee in bankruptcy, to recover lands which the bankrupt claims as his homestead exemption, an order of the bankrupt court, rendered after the commencement of the suit, *nunc pro tunc* (but not stating of what time), on the *ex parte* petition of the bankrupt; which recites that 'it appears to the court that a homestead exemption was regularly set aside and assigned to the said bankrupt, but there is no record evidence to protect his title', and therefore orders the assignee of his estate to "execute to said bankrupt a conveyance, *nunc pro tunc*, of the fol-

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lowing real estate, as his homestead exemption,"—is not admissible evidence against the plaintiff, when offered without the petition, the action of the court assigning the homestead, or other judicial proceeding had in connection with it.

5. *Homestead exemption under constitution; where lands are worth more than \$2,000.*—The constitution of 1868, like the present constitution, without the aid of statutory provisions, exempted a homestead not exceeding \$2,000 in value; but, if the homestead, when reduced to its lowest practicable area, exceeded that value, no part of it was exempted, and the whole might be aliened by the husband by any ordinary mortgage or other conveyance.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN K. HENRY.

This action was brought by Farley, Spear & Co., suing as a partnership, against James M. Whitehead, to recover "ten acres of land in the city of Greenville, known as the homestead of John M. Sutherlin, and lately occupied by him;" and was commenced on the 7th March, 1876. J. M. Sutherlin, "on his own motion, was admitted to defend as the warrantor of said Whitehead," and pleaded not guilty; and issue was joined on this plea. The plaintiffs claimed under a mortgage executed by said Sutherlin to D. C. Taylor, which was assigned to the plaintiffs, and also under a purchase by them at a sale made by John F. Bailey, as the assignee in bankruptcy of said Sutherlin's estate; while the defendant held and claimed the premises as the homestead exemption of said Sutherlin. "On the trial," as the bill of exceptions states, "the plaintiff offered in evidence the following mortgage, together with the transfer, or assignment thereof, to Farley, *Smith & Co.* It was admitted that J. T. McDonald had a regular power of attorney from D. C. Taylor to make the assignment, and that he did make the transfer attached to the mortgage, and sign his name to the same. The defendant objected to the admission of such transfer as evidence, because there was no attesting witness to McDonald's signature, and no acknowledgment before an officer; but his objection was overruled by the court." The transfer, or assignment of the mortgage, is no where set out in the transcript. The mortgage was executed by said J. M. Sutherlin to D. C. Taylor; purported to be given to secure the payment of a promissory note for \$10,000, borrowed money, of even date with the mortgage, and payable ninety days after date; was dated the 23d February, 1871; conveyed the premises here sued for, with an adjoining tract of land, containing in all two hundred acres, with several horses and mules, household furniture, &c.; and contained a power of sale on default. It was signed by said J. M. Sutherlin alone, duly attested by two witnesses, and admitted to record, on

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the 4th March, 1871, on proof by one of the subscribing witnesses.

The plaintiffs then offered in evidence a transcript from the District Court of the United States at Montgomery, showing—1st, a petition filed by John F. Bailey and William Miller, as the assignees in bankruptcy of said Sutherlin, asking the sale of the lands now in controversy, subject to the mortgage to Farley, Smith & Co., and of other lands belonging to said bankrupt; 2d, an order made by Lawrence Worrall, as register in bankruptcy, directing subpoenas to be issued and served on Farley, Smith & Co. and other parties interested, notifying them of the filing of said petition, and requiring them to appear and answer, &c.; 3d, an order (or decree) of said District Court, sitting in bankruptcy, directing a sale of the lands by the assignees, as prayed in the petition; 4th, the report of the sale by the assignees, stating that Farley, Smith & Co. had become the purchasers of the lands; 5th, an order (or decree) of the court, confirming the report of the sale, and directing the assignees to execute a conveyance to the purchaser. The petition of the assignees was filed on the 14th June, 1872; the order of sale was granted on the 31st January, 1873; the report of the sale was made on the 7th December, and confirmed on the 8th December, 1875; but the day on which the sale was made is not stated. "The defendants objected to said transcript, that it showed on its face that it was not a complete transcript, and that defendants were not parties to said proceeding, and that it did not show any title in plaintiffs." The court overruled the objections, and admitted the transcript; but it does not appear that any exception was reserved to its admission.

"They then offered the defendant Whitehead as a witness, who testified that the property sued for is a part of the property described in the said mortgage to D. C. Taylor; that he (witness) is in possession of the same, having purchased the same from said Sutherlin in the early part of the year 1874; that said Sutherlin was in possession, and residing with his family upon the same, prior to that time, from about 1869, continuously up to the time of his sale to witness; that the value of the property, at the time of the commencement of the suit, was about \$2,500, and that it was worth from \$3,000 to \$4,000 at the time of the execution of the mortgage to Taylor. Witness stated, on cross-examination, that Sutherlin told him, at the time he sold to witness, that this property was exempt as a homestead." The plaintiffs objected to this last statement by the witness, and reserved an exception to the overruling of their objection. "Several witnesses

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were examined, as to the value of the property at the commencement of the suit ; some of them putting it as high as \$2,500, and some as low as \$1,600."

The defendants then offered in evidence a transcript, duly certified by the clerk under his official seal, in the following words: "In United States Court, Middle District of Alabama. In bankruptcy. *Ex parte* J. M. Sutherlin, bankrupt. Upon the hearing of the petition in this cause, it appears to the court that the facts set forth in the petition are true ; and it further appearing that a homestead exemption was regularly set aside and assigned to the said bankrupt, but that there is no record evidence of any conveyance therefor to protect the legal title ; it is therefore ordered by the court, that J. F. Bailey, assignee of said bankrupt's estate, execute to said J. M. Sutherlin, bankrupt, a conveyance *nunc pro tunc* of the following real estate, as a homestead exemption," describing it, "which was heretofore assigned and set apart to him." (This decree was signed by the presiding judge of said court, and dated the 5th June, 1876.) "The plaintiffs objected to the introduction of this paper, on the ground that it did not show at what time the exemption was allowed; and on the further ground, that the court had no authority to make such an order, so as to affect the rights of the plaintiffs, which had vested prior to the making of said order. The court overruled their objections, and the plaintiffs excepted." The defendants then offered in evidence Sutherlin's deed to Whitehead for the premises, which was dated the 19th May, 1874, and a mortgage executed by Whitehead to Sutherlin, of even date with the deed, which was given to secure the payment of \$2,000, the alleged purchase-money ; and the court admitted them, against the plaintiffs' objection on the ground of irrelevancy ; to which rulings plaintiffs excepted.

"The court charged the jury, among other things, that the plaintiffs must recover, if at all, on the strength of their own title, and the burden of establishing the averments of their complaint rests on them ; that the mortgage from Sutherlin to D. C. Taylor, which they have introduced, and which had been transferred to them, with proof of non-payment of the mortgage debt, and the defendants' possession of the lands, establishes the plaintiffs' *prima facie* right to recover in this action, and entitles them to a verdict, unless the other evidence in the case defeats this right. But, if they find, from the evidence, that Sutherlin was a married man when he executed said mortgage to Taylor, and lived with his wife in the house and on the lands sued for at the time said mortgage was executed, and that they were then, and had been

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for several years, occupying and claiming the same as their homestead, and neither owned nor occupied any other house as such in said county, or elsewhere; then the said mortgage, not having been signed and executed by said Sutherlin's wife, as required by law, or otherwise, was wholly invalid as to the homestead, and conveyed to Taylor no title to said homestead, although valid as to the other property named therein; and it makes no difference, as to this point, whether Sutherlin had, prior to that time, made written claim to said homestead or not.

"The court charged the jury, also, that the transcript of the proceedings of the bankrupt court, offered in evidence by the plaintiffs, together with the facts that the deed to plaintiffs had been made to them by the assignees, but not delivered to them, established their *prima facie* right to recover the lands mentioned in their complaint; but that the transcript (or record) from said bankrupt court, offered in evidence by the defendants, declares that the property here sued for 'was regularly set aside and assigned to said J. M. Sutherlin as his homestead,' by the same court which ordered the sale of the lands; and this authorizes the presumption that the homestead was set aside and assigned before the order of sale; for it could not have been 'regularly' after the order of sale, without first setting aside the order assigning the homestead to Sutherlin, and there was no evidence from the record of any such action by the court. And although the order of sale may have included the said homestead here sued for, and although it may have been *dated* (?) with other lands at the sale, and purchased by plaintiffs, and the sale was regularly reported and confirmed, and the assignees ordered to make a deed, and the deed was actually made; yet these facts would pass no title to the purchasers, as against the defendants, who claim under Sutherlin, if said property had actually been set aside and assigned to said Sutherlin as a homestead by the bankrupt court, before any proceedings were had by the said court for the sale of said lands, unless the said order setting aside the homestead had been revoked or set aside. And if the lands sued for were in fact set apart to Sutherlin, as a homestead, by the said bankrupt court, before any proceedings were had in said court for the sale of the same, and said action of the court remained unrevoked in any way; these facts would not only defeat plaintiffs' right to recover under the proceedings and sale in bankruptcy, but also under Sutherlin's mortgage to Taylor."

The plaintiffs excepted to each of these charges, and requested the following charges, which were in writing: 1. "If

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the property in controversy, at the time of the execution of the mortgage by Sutherlin to Taylor, exceeded in value the sum of \$2,000, then the mortgage was valid, and passed the legal title to Taylor." 2. "The burden of proving that the property was claimed as exempt is upon the defendant; and when he affirms that the mortgage to Taylor is void, because it included the homestead, it is for him to show that the property was exempt at the time of the execution of said mortgage, and that it did not exceed \$2,000 in value." 3. "If the whole evidence shows that the property sued for was worth more than \$2,000 at the commencement of the suit; or, if the weight of the evidence fails to show that it was not worth more than that sum at that time; then it would not be exempt, unless it had been so adjudicated by the bankrupt court before the bankrupt sale." 4. "That Sutherlin, being a non-resident, cannot insist on the exemption laws in a suit in this State." The court refused each of these charges, and the plaintiffs excepted to their refusal.

The charges given by the court, the refusal of the charges asked, and the several rulings of the court on the evidence to which exceptions were reserved, are now assigned as error.

WATTS & SONS, for appellants.—The lot sued for is situated within the corporate limits of Greenville. Its value, at the time the mortgage to Taylor was executed, was from \$3,500 to \$4,000; and as to its value at the commencement of the suit, whether over or under \$2,000, the evidence was conflicting. Under these facts, a homestead can not be claimed in the premises.—*Miller v. Marx*, 55 Ala. 322; *Weber v. Short*, 55 Ala. 311. The general rule is, that a conveyance is either valid or void at the time of its execution, and it can not be rendered void by any event subsequently occurring; and this rule applies to a mortgage of the homestead: if valid at the time of its execution, the subsequent depreciation in the value of the property cannot invalidate it.—*Watts v. Burnett*, 56 Ala. 340. The rights of the plaintiffs in this suit, under the mortgage, and under their purchase at the sale by the assignee in bankruptcy, cannot be affected by the order or decree rendered by the bankrupt court on the application of the bankrupt. That was an *ex parte* proceeding, of which they had no notice, and which could not affect the rights already vested in them. It was, moreover, rendered after the commencement of this suit; and though rendered *nunc pro tunc*, the time to which it was intended to relate is not shown. It is but a fragmentary or partial transcript; and if its recitals are true, better evidence exists of the homestead right. As against these plaintiffs, that decree

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is void.—Freeman on Judgment, §§ 72-74; *Binford v. Daniels*, 13 Ala. 667; *Hudson v. Hudson*, 20 Ala. 364; *Chighizola v. Le Baron*, 24 Ala. 237; *Summersett v. Summerville*, 40 Ala. 596.

HERBERT & BUELL, *contra*.—In this action, the plaintiffs can only recover on proof of a legal title in themselves; and failing to show such title, or prior possession in themselves, they cannot attack the defendant's title.—*Brock v. Younge*, 4 Ala. 584. They cannot recover under their purchase at the sale by the assignee in bankruptcy, because they showed no deed from the assignee.—*Bonner v. Greenlee*, 6 Ala. 411; *Lightfoot v. Lewis*, 1 Ala. 475. They cannot recover under the mortgage, because the assignment is not shown to have been by proper words of conveyance; and if it was in proper form, the assignment was neither attested nor acknowledged. Rev. Code, §§ 1535-36; *Graham & Rogers v. Newman*, 21 Ala. 497. Having shown no title in themselves, any erroneous rulings against plaintiffs worked no injury, and are no cause for a reversal.—See cases collected in 1 Brickell's Digest, 780, § 97. But no error is shown in any of the rulings complained of. The objections to the transcript were not well taken. The jurisdiction and authority of the court to make the order cannot be doubted; and it was not necessary to show the time when the exemption was allowed, as an ingredient of the judgment *nunc pro tunc*. All courts may amend their records *nunc pro tunc*, so as to make them speak the truth; and it is not necessary to give notice to the adverse party, nor to set out the evidence on which the amendment was allowed.—*Allen v. Bradford*, 3 Ala. 281; *Farmer v. Wilson*, 34 Ala. 75; *Price v. Gillespie*, 28 Ala. 279; 1 Brickell's Digest, 72, § 18.

STONE, J.—This was a statutory action of ejectment, to recover possession of lands, in which the verdict and judgment were for the defendant. It is contended for appellee, that as the plaintiffs must recover on the strength of their own title, and show what is equivalent to a legal title in them, it is immaterial what may have been the rulings of the Circuit Court, the judgment must be affirmed, because the plaintiffs failed to show a right of recovery, and are therefore not injured by any rulings the court made. It is certainly the rule in this court, that if the record shows, affirmatively and clearly, that the plaintiff never can recover, then he cannot complain of any rulings of the court against him, no matter how erroneous such rulings may be, as matter of law. Such erroneous rulings are, at most, error without injury.—*Alexander v. Caldwell*, 61 Ala. 543; 1 Brick. Dig.

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780, §§ 96, 97. To come within this rule, however, the facts negating plaintiff's right of recovery must be clear and uncontroverted. Indefiniteness and insufficiency of the plaintiff's evidence will not authorize the application of the rule.—*Ib.* 780, § 98.

It is contended for appellee that plaintiffs below, having failed to prove title in themselves, are brought within the rule stated above. It must be conceded that there is not enough in the bill of exceptions to prove a legal title in plaintiffs. Their purchase at assignee's sale, not being followed by a conveyance, vested, at most, an equitable title in Farley, Spear & Co. An equitable title will not support ejectment. Neither can plaintiffs recover on the mortgage made to Taylor, without showing a deed from the mortgagee to them, either indorsed on the mortgage, or by a separate conveyance.—*Graham v. Newman*, 21 Ala. 497. The recital in the bill of exceptions in this case falls far short of proof of a conveyance of title. What the substance or form of the transfer was, we are not informed. But the bill of exceptions does not affirm that it contains all the evidence. In such case, we cannot apply the doctrine of error without injury.—*Marshall v. Betner*, 17 Ala. 832; *Adams v. Adams*, 26 Ala. 272; *Pinkston v. Green*, 9 Ala. 19; *Young v. Dumas*, 30 Ala. 213. When error is shown, the presumption of injury arises, and must be clearly repelled by the record, or the judgment will be reversed.—1 Brick. Dig. 780, § 100; *Castello v. Thompson*, 9 Ala. 937; *Williams v. Cannon*, 9 Ala. 348.

The defense relied on was, that the premises sued for were exempt to Sutherlin as his homestead. A certified copy of an order, made in the District Court in bankruptcy, was relied on in support of this defense. That order was made after the present suit was brought. It purports to be a judgment rendered *nunc pro tunc*, but does not show when the order was made, which it assumes to amend. It is headed "*Ex parte J. M. Sutherlin, bankrupt*;" and declares that, "upon the hearing of the petition in this cause, it appears to the court that the facts set forth in the petition are true; and it further appearing that a homestead exemption was regularly set aside and assigned to said bankrupt, but that there is no record evidence of any conveyance therefor to protect his title; it is therefore ordered by the court, that J. F. Bailey, assignee of said bankrupt's estate, execute to said J. M. Sutherlin, bankrupt, a conveyance *nunc pro tunc* of the following real estate, as a homestead exemption," &c. The petition referred to in the order was not produced. The order, certified by the clerk as a true copy of the original,

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was offered alone, and received in evidence, against the objection of plaintiffs. Neither the bankrupt's claim of exemption, nor the action of the court, or of the assignee, in allowing the claim of homestead exemption, is shown in the present record. It will be observed that, in the order made by the District Court, granting the prayer of the petition, no complaint had been made that the record did not show the homestead exemption had been set aside. The court affirmed that such exemption "was [had been] regularly set aside and assigned to said bankrupt." The complaint made, and the relief sought, rest on the fact affirmed, that *there is no record evidence of any conveyance therefor to protect his* [the bankrupt's] *title*. If this be true, there was evidence that the homestead had been set aside and assigned; and the additional security the bankrupt sought and obtained an order for, was record evidence of a conveyance to protect his title. It would seem that a bankrupt is not entitled to a conveyance of his homestead by the assignee. The title to exempt property never vested in the assignee.—Rev. Stat. U. S. § 5045. But, be this as it may, the transcript offered in evidence was fragmentary, omitting all connection with a judicial proceeding, and omitting the petition on which it was granted, and all evidence of record, or *quasi* of record, that the homestead had been regularly set aside and assigned. The Circuit Court erred in admitting this certified copy-order in evidence against the present plaintiffs, whose asserted right accrued before the order was made.—1 Brick. Dig. 823, §§ 282, 283.

There is another phase of the defense in this case in which the Circuit Court erred. It is settled in this court, that the homestead which the constitution exempts, shall not exceed in value two thousand dollars.—*Miller v. Marx*, 55 Ala. To that extent, the constitutions of 1868 and of 1875 operate a complete exemption by their mere unaided force. If, after being reduced to the lowest practicable area, the homestead still exceeds two thousand dollars in value, it is entirely without the operation of the constitutional protection; and the conveyance of it by the owner, being a married man, without the voluntary signature and assent of his wife, is not made void by that instrument. If, when the mortgage was made, the homestead exceeded two thousand dollars in value, Sutherlin had no valid claim to have it declared exempt from the grants and covenants contained in his mortgage to Taylor.—*Watts v. Burnett*, 56 Ala. 340.

Several of the rulings of the Circuit Court are opposed to these views.

The judgment is reversed and remanded.

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Blackman v. Dowling.*Action on Promissory Note, by Payee against Maker.*

1. *Written contract; implied stipulations.*—When parties enter into written contracts, the express stipulations and conditions therein contained can not be extended by implication: the writing is presumed to express all the stipulations, and none can be implied.

2. *Conditional note.*—Where a promissory note, given in consideration of the payee's interest in a contract with the United States for carrying the mail on a specified route, contains the express conditions, "that said route is not abolished, nor the pay by the United States diminished"; the failure of the principal contractor, under whom the payee of the note derived his interest in the contract, to pay over to the maker his proportion of the compensation received from the United States, is no defense to an action on the note.

APPEAL from the Circuit Court of Dale.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Thomas G. Blackman, against John W. Dowling; was commenced on the 20th August, 1874, and was founded on a written contract, or promissory note, signed by the defendant, of which the following is a copy:

"Ozark, Ala., Dec. 29th, 1869. By the first day of January, 1871, I promise to pay Thomas G. Blackman two hundred dollars for his part of the mail contract on route No. 6789, in Alabama; on the condition, that said route is not abolished, nor the pay by the United States is not diminished during the time of said contract; in which event, such pay to be in *pro rata* with that that I may receive from the United States."

The defendant pleaded, "in short by consent—1st, the general issue; 2d, payment and set-off; 3d, failure of consideration;" and, 4th, a special plea as follows: "That the consideration for which said note was given was a one-third interest which plaintiff had in a contract for carrying the mail on route No. 6789, from Geneva to Louisville, Alabama, and subsequently extended to Clayton; that defendant purchased said interest in said contract from plaintiff on the 29th December, 1869, giving him the note for \$200, on which this suit is founded, with a proviso therein contained, that if any reduction or change in the pay for carrying the mail on said route should be made by the post-office department of the United States, then defendant would pay, according thereto, such *pro rata* of said \$200 as might be paid after

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such reduction ; that defendant owned a two-thirds interest in said contract, and plaintiff a one-third interest therein ; that a deduction of the pay for carrying said mail over said route was made by the post-office department, and was made to apply to the entire contract, embracing the period from July 8th, 1867, to June 30th, 1871, amounting in the aggregate to about \$730, one third of which sum embraced and covered the said interest of plaintiff, being over \$200 ; all which was, in consequence of said reduction, totally lost by defendant. Wherefore, according to the proviso in said note contained, defendant does not owe plaintiff any thing." Issue seems to have been joined on all these pleas.

It was shown on the trial, as appears from the bill of exceptions, that in 1867 the plaintiff and defendant, together with one Hughes, desiring to procure the contract for carrying the United States mails over the route designated in the note sued on, and being unable to obtain it in their own names under the laws and regulations then in force, induced one Bryan Tyson, of Washington City, to take the contract in his own name, for them ; they becoming bound as his sureties, and performing the service, and allowing him to retain five per cent. of the compensation, which was paid to him. The compensation was \$1,000, payable quarterly ; and the contract extended from July 1st, 1867, to June 30th, 1871. During this term, the contract was modified by orders from the post-office department, as follows : "September 15, 1869. Extend route ten miles, to commence at Clayton, and add \$123.45 to annual pay from October 1, 1869." "October 27, 1870. Omit Brundidge, reducing distance fifteen miles, and deduct \$185.18 *per annum, pro rata* from July 8, 1867, and allow one month extra pay on sum saved." "December 5, 1871. Modify order of October 27, 1870, so as to take effect October 11, 1867." "August 16, 1872. Revoke order of December 5, 1871, and modify order of October 27, 1870, so as to make it take effect from its date, instead of July 8, 1867." The money was paid regularly to Tyson, and by him to the defendant and Hughes according to their contract ; except that, under the orders revoking the order by which the compensation was reduced, he received \$61.33 on the 18th October, 1872, and failed to pay over any part of it to them.

The court charged the jury, among other things, as follows : "If you find, from the evidence, that the mail route was not abolished, nor the pay reduced, during the period named in the contract, your verdict will be for the plaintiff, for the whole amount promised, with interest from the 1st January, 1871. The first material inquiry is, was the route abolished, or the pay reduced ? If, from the evidence, you

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find that it was abolished, or the pay reduced, then the next inquiry is, how much pay did the defendant receive under the contract so abolished or reduced; and your verdict will be for the plaintiff, for such portion of the two hundred dollars promised as the amount actually received bears to the amount defendant would have received under the contract then existing, had the route not been abolished, or the pay reduced. The plaintiff insists, that if Tyson received the full amount of pay that was or would be due under the contract, as it existed at the time plaintiff sold his interest to defendant, then defendant is liable on his promise, whether he received it or not. Tyson was as much the agent of plaintiff as defendant, although plaintiff sold his interest in the contract to defendant; so that, if you find that Tyson received the money, then the question is, whether the defendant failed to receive it through any fault of his own. If he did, he is liable as though he had received it; but, if his failure to collect it was no fault of his, then he is not liable, but for the proportion of so much as he did receive." This charge, to which the plaintiff excepted, he now assigns as error, together with the refusal of several charges asked by him.

W. D. WOOD, for appellant.

W. C. OATES, *contra*.

BRICKELL, C. J.—The questions presented by the record involve the construction of the contract on which the suit is founded. The contract is not absolute: it is subject to a condition, or a contingency, clearly expressed—the abolition of the mail-route—on the happening of which, the promissor would be discharged from all liability. And it is subject to another condition, on the happening of which there would be an abatement of the sum of money the promissor was bound to pay. The condition is a diminution by the United States of the compensation promised for the carrying of the mail on this route. The parties have thus expressed in writing the conditions by which they are to be bound; and it is not in the power of the courts to imply the existence of others. The rule is of very general, if not universal application, that where parties have entered into written engagements, with express stipulations, these cannot be extended by implication. The presumption is, that, having expressed some, they have expressed all the conditions by which they intend to be bound.

The sum which Dowling promised to pay was not subject
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to abatement, because he may not have received the compensation to which he was entitled under the contract for carrying the mail. It was subject to abatement only in the event the United States diminished the compensation. There was at one time a diminution, but afterwards this order was revoked, and the original compensation restored. The United States paid over the compensation to Tyson, the contractor, to whom alone it could have been properly paid, and with whom alone the contract was made. Such payment the parties must have contemplated. Whatever relation may have existed between Tyson and Blackman, before the sale by the latter of his interest in the mail contract to Dowling, was dissolved by the sale. Blackman, after the sale, had no right or interest which Tyson could represent. He was not entitled to receive, either from Tyson, or from the United States, any part of the compensation due from the latter for carrying the mail. All his rights in this respect passed to Dowling by the sale; and having no rights Tyson could represent, it follows that he is not bound or affected by Tyson's acts or omissions, or by his want of fidelity to Dowling. To make him answerable for Tyson's unfaithfulness is to imply a stipulation not found in the contract.

The rulings of the Circuit Court were inconsistent with these views; and the judgment must be reversed, and the cause remanded.

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Indictment for Murder.

1 *Proof of insanity.*—On the question of insanity *vel non*, sleeplessness and nervous restlessness are admissible evidence; inconclusive, of course, but still a circumstance to be weighed by the jury.

2. *Exception to evidence; certainty requisite in.*—Where the bill of exceptions sets out evidence, some of which is inadmissible, in one continuous sentence, and then adds, "The State objected to this testimony as it was offered, and the court sustained each objection, and the defendant separately excepted;" the exception is wanting in the requisite definiteness and certainty.

3. *Insanity as defense.*—Since an unsound mind can not form a criminal intent, which is an indispensable element of every crime, insanity, when fully proved, is a complete defense to a criminal charge; but no defense is more easily simulated, and the evidence adduced in support of it should be carefully and considerately scanned. It is difficult to lay down an absolute rule for the government of all cases, and each case must depend, more or less, on its own particular facts.

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4. *Same*.—Prior to the decision in *McNaghten's case*, before the House of Lords in 1843 (10 Cl. & F. 200), the test of insanity, as a defense to a criminal charge, was, in the great majority of English cases, held to be the capacity to know right from wrong. But the rule laid down in that case, which this court adopts, as applicable to cases of insane delusion, or partial insanity, holds a person not responsible criminally for an act committed under the influence of an insane delusion existing in his mind at the time, *when* (and *only when*) the fact, or state of facts, the existence of which he believes under such insane delusion, would, if actually existing, justify or excuse the act.

5. *Same*.—To justify the inference of insanity, such as will justify or excuse a homicidé, from the calmness of manner and indifference to results, which sometimes mark the conduct of such persons, there should be convincing evidence of previous insanity, or insane delusions, so recent as, when coupled with the causelessness of the killing, to raise the presumption that the paroxysm had not entirely passed away. On the other hand, calmness, indifference to results, and consciousness of the criminality of the act, with connectedness in the employment of the reasoning faculty, while not conclusive, are strong circumstances tending to prove legal accountability.

6. *Same*.—Moral insanity, which consists of irresistible impulse, co-existing with mental sanity, has no support either in psychology or in law.

7. *Same; burden and measure of proof*.—The law presumes sanity, and that presumption must prevail until it is overcome; and when insanity is set up as a defense in a criminal case, whether the evidence of it arises out of the testimony which proves the commission of the act, or is shown *abunde*, it is insufficient until it overturns the presumption of sanity. (*The State v. Marler*, 2 Ala. 43, and *Brinyea v. The State*, 5 Ala. 241, commented on, as self-repugnant on this question.)

FROM the Circuit Court of Talladega.

Tried before the Hon. JOHN HENDERSON.

The prisoner in this case, George Boswell, was indicted for the murder of Eliza Embry, by stabbing her with a knife; was tried on issue joined on the plea of not guilty; found guilty of murder in the first degree, and sentenced to be hanged. The prisoner was a mulatto man, whose former wife had been dead five or six years, leaving several children living with him, the oldest being a boy about fifteen years old; and Eliza Embry was a young mulatto woman, whom he had been courting, and who, as he claimed, had promised to marry him, but married another man, Wesley Embry by name. The murder was committed on the 2d February, 1878, about the middle of the day, on the public square in Talladega, a few minutes after the said Eliza and Wesley Embry had been married by the probate judge in his office. The circumstances immediately preceding the commission of the crime were thus stated by the probate judge, who was examined as a witness for the prosecution: "On the 2d of February, 1878, between one and two o'clock, P. M., while I was preparing a marriage-license for Wesley Embry and Eliza Truss, the defendant came into my office, and asked me, 'if a girl could obtain a license to marry another man, after having promised to marry him.' I told him, 'yes; that she had the right to change her mind,' and he then left the

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room. After I had married Wesley and Eliza, and Wesley had gone out, the defendant returned, and sat down close to Eliza, and held some conversation with her, none of which I understood. The south door of the room was opened by some one (Mr. Hamill, I think), and Eliza, rather hastily, moved her chair from near the defendant, to a point near me, and sat down. About this time Wesley returned to the room, and proposed to Eliza that they go home. She immediately got up, and gathered up some bundles and wraps, and the three left the room; Wesley going in front, Eliza next, and the defendant last. In a very short time I heard screams in the court-yard, and, looking out of the window, saw the defendant have Eliza pushed back against the bell-tower, with one arm around her, and striking her with the other; and I saw Eliza get loose from him, and run away. I ran to the west door of the room, and just after I stepped out of it, the defendant walked up to me, and said, '*Judge, I done it. She promised to marry me, and has gone back on me.*'" (Or, as afterwards stated by the witness, "*Judge, I done it, and if I have got to hang, let me hang. She promised to marry me, and has married another fellow: she has gone back on me.*") The deceased ran several steps, and fell, and died in a few minutes; her throat being cut, and eight other wounds with a knife being inflicted on her person.

Another witness for the prosecution, who saw the stabbing, testified that he was standing on the steps of the court-house when the parties came out of the probate judge's office, and thus proceeded: "I heard George [the prisoner] say, 'Wesley, you go on, I've got something to tell Liza.' Wesley went on, towards the fence beyond the bell-tower; and George then said, 'Liza, you've gone back on me.' She said, 'George, I didn't love you well enough to marry you.' By this time, they were opposite the bell tower, and Wesley was outside of the fence, at his buggy. George seized Eliza, and stabbed her three or four times. She screamed, and jerked away from him, and ran towards the east side of the square; and he walked back towards the west door of the court-house, and gave himself up to Judge Thornton. The stabbing was done in plain view of a large number of people. George was not excited, and did not look like he had been drinking. He did not try to get away, but went quietly to Judge Thornton, and gave himself up." Another witness for the prosecution testified that, about one o'clock in the afternoon of that day, the defendant came into his store, where guns, pistols, and knives were kept for sale, and bought a knife with two blades, the larger one being from three to three and a half inches long; "saying that he wanted a keen, sharp knife, that would

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cut leather." The mother of the deceased testified, among other things, that the prisoner came to her house one night, in December preceding the killing, and she heard him ask Eliza to marry him; and that on her refusal, she heard him say: "My God, woman, where is your heart? If you marry any body but me, I'll cut your throat, and cut my own throat, and send my soul to hell." Another witness for the prosecution testified, that he met the defendant one morning in December, coming from the direction of the house where the deceased was living with her father and mother; that the defendant stopped him, and during their conversation said: "I am afraid they are going to pull back on me down there; and if they do, it will break my heart, and I will kill." The sheriff of the county, who was introduced as a witness for the defense, testified that, when he arrested the defendant, immediately after the killing, he took from him a pistol with five barrels, all loaded, a knife with two blades, the larger one being bloody and slightly bent, some papers and money, and two pint-bottles of whiskey, one of which was full, and the other about one-third full.

Insanity was set up as a defense. Several witnesses testified to the intimate relations which existed between the deceased and the prisoner, for some time previous to the killing, the messages which were sent between them, the presents which he had given to her, and the preparations he had made and was making for his approaching marriage with her, which, as he said, was to take place in a short time. Several exceptions were reserved by the defendant to the rulings of the court in excluding portions of this evidence, but, as the case is here presented, they require no particular notice. "Charley Boswell was introduced as a witness by the defendant, and testified as follows: 'I am a son of the defendant. My mother has been dead five or six years. I have a sister and two brothers. I am the eldest, and am fifteen years old. We lived last year on Dr. McClellan's place. During last January, we lived on James Wood's place. I knew Eliza Truss, and have often seen her and my father together, and have carried messages between them. One message was, Edie Collins told me to tell my father that Eliza wanted him to meet her at Edie's on last Christmas night. I delivered that message, and it was the last one. My father was away from home a good many nights last January. My father and we children lived in a house by ourselves on Mr. Wood's place.' The defendant offered to prove by this witness, that the defendant slept very little last January during the nights he was at home; that he was restless at night, and spent much time in walking the floor, and

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complained of being unable to sleep; also, that he had heard defendant say he was engaged to marry Eliza Truss, and was going to bring her home soon, for a new mother for him; also, that defendant brought home provisions, and articles of household furniture, saying that he was going to marry Eliza Truss, and was fixing to go to house-keeping. The State objected to this testimony, as it was offered, and the court sustained each objection; and the defendant separately excepted." It was proved that the defendant's character was that of a quiet and peaceable man, but some of the witnesses said that he was nervous and excitable, though they had never known him to be engaged in any personal difficulty. One absent witness for the defendant, a written statement of whose testimony was admitted, detailed an occurrence which took place about ten years before the killing, and during the life of the defendant's wife, when the defendant attempted to kill him, on finding him at his (defendant's) house eating supper with his wife; but begged his pardon the next time he saw him, and said that he was not in his right mind at the time. Another absent witness, whose testimony was admitted in the same way, saw the defendant with Eliza and Wesley Embry on the morning the killing occurred, while they were on their way to town, the defendant walking, and the others riding in a buggy; saw the defendant help Wesley to fix one of the shafts of the buggy, and saw him talking and laughing with Eliza and Wesley; and she said that "he seemed in a good humor, and his manner was quiet and as usual." Numerous exceptions, over fifty in all, were reserved by the defendant to the rulings of the court in excluding evidence; but a statement of these matters is not material to an understanding of the points decided by this court. The bill of exceptions is very long, and purports to set out all the evidence adduced.

The court charged the jury in writing, and several exceptions were reserved by the defendant to different portions of the charge; the parts excepted to being inclosed in brackets, as follows:

"The law presumes that the defendant is innocent, and the State must prove to the jury that he is guilty beyond a reasonable doubt, as charged, before you can so find him. Murder is the felonious taking of human life, with malice aforethought. Malice is such a depraved and wicked condition of mind as shows a total disregard of social duty, and a heart or will bent wholly on evil. Malice may be express or implied. Threats to take life, without any provocation, or without reasonable provocation(?). Malice may be implied or inferred from the deliberate perpetration and use of dead-

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ly weapons in taking human life. If the killing was intentionally done by the defendant, and without reasonable provocation, justification, or excuse, the law conclusively presumes that it was done with malice aforethought. [Passion, without a reasonable provocation, which causes one person to take the life of another, is malice.] [It is, therefore, not a question proper for your consideration, whether the defendant was impelled by passion to take the life of Eliza Embry (if he in fact killed her), unless the circumstances and causes that moved him to take life were such as to have excited the passion and provoked a reasonable man to such an extent as to dethrone reason, and excite passion beyond control.] [All persons are alike bound to control their passions; and the law, in such cases, makes no more allowance for the passions and temper of one man, than for the passions and temper of others; and passions, not founded on reasonable provocation, will not reduce a killing from a higher to a lower degree of homicide].

“If the defendant, in this county, and before the finding of the indictment in this case, willfully, maliciously, deliberately, and with premeditation killed Eliza Embry, by stabbing her with a knife, then he is guilty of murder in the first degree. To constitute murder in the first degree, it is not necessary that the willful, malicious, deliberate, and premeditated purpose to take life should have existed with the defendant any particular length of time before the killing. If the malice existed at and before the killing, though but for an instant of time, it was malice aforethought; and if the defendant distinctly formed in his mind the purpose to take the life of Eliza Embry, and thought over the matter, and prepared for it before the killing, and killed the deceased in accordance with this formed purpose or design; it would be a willful, malicious, deliberate, and premeditated killing, and, consequently, murder in the first degree. [If the defendant killed the deceased, because she refused to marry him and married another man, even though she may have promised to marry him before she married Wesley Embry, this would not be such provocation as would reduce the killing from murder in the first degree to murder in the second degree, if, independent of the fact of her promise to marry the defendant, you find all the elements of murder in the first degree, as above described, to exist in this case]. If the defendant, in this county, and before the finding of this indictment, willfully, and with malice aforethought, but without either deliberation or premeditation, killed Eliza Embry by stabbing her with a knife, then he is guilty of murder in the second degree.

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“ [When the plea of insanity is interposed, to protect one from the legal consequences of an act which amounts to a crime, to render the defense available, the evidence must be such as to convince the minds of the jury that, at the time the act was done, the accused was not conscious that, in doing the particular act, he was committing a crime against the laws of God and his country]. [If he knew right from wrong, and knew that he was violating the law, he is then guilty; for it is the conscious knowledge, connected with the act, that constitutes the crime.] [If, therefore, the accused insists that he was insane, he must adduce proof that will satisfy the jury that the act was not connected with the knowledge of its criminality; and this proof should be clear and satisfactory.]

“ It is expected of parties, attorneys, and sometimes of witnesses, that they feel deeply interested in the result of causes affecting great and vital interests. It is all right and proper, and even commendable in counsel, to manifest zeal in the advocacy of causes confided to them, in proper bounds. But courts and juries must look at things from a different standpoint. As jurors, you can have no anxiety to convict the defendant on account of any real or supposed enormity of the offense with which he is charged: you can have no sympathy with either the living or the dead; and if either should enter into your verdict this trial would be a mockery, and you parties to it. The evidence in the case is the great polar-star, in the light of which you are to pursue your investigations after the truth of the matters submitted for your decision. Without anxiety to convict the defendant, without animosity to any one, without sympathy for the living or the dead, and, like the law, knowing no man, weigh the evidence honestly, faithfully, and impartially, and on it, and it alone, render a truthful verdict.

“ [If you find the defendant guilty of murder in either the first or second degree, then, under the law, you must determine what punishment shall be inflicted on him for his crime.] [It is laid down in the law-books, that the object of punishing crime is two-fold—to reform offenders, and to make such an example of offenders as will deter others from offending in like manner. Murder in the first degree is punished with death, or imprisonment in the penitentiary for life, at the discretion of the jury. Murder in the second degree must, on conviction, be imprisoned in the penitentiary, or sentenced to hard labor for the county, for not less than ten years, at the discretion of the jury. If you find the defendant guilty, the form of your verdict will be, ‘*We, the jury, find the defendant guilty of murder in the — degree,*’ the

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degree you may agree on, '*and sentence him to,*'—here insert the punishment you may agree on, and one of you sign it as foreman. If you find the defendant not guilty, you will so say by your verdict, and one of you sign it as foreman.]”

The defendant excepted to this entire charge, and also to each part separately which is included in brackets; and he then requested the court to give the following charges, which were in writing:

“1. Drunkenness may produce a state of mind which would render a person incapable of forming or entertaining the design or intention to take life; and if the jury find, from the evidence, that the defendant was in such a state of mind, from drunkenness, at the time of the killing, then they can not find him guilty of murder.

“2. Before the defendant can be convicted of murder, the jury must be satisfied by the evidence, beyond all reasonable doubt, that he intended to take life; and if they believe from the evidence that, at the time of the killing, he was too much intoxicated to have entertained any such intention, then they can not find him guilty of murder.

“3. If, from any cause shown by the evidence to the satisfaction of the jury, the condition or state of the defendant's mind, at the time of the killing, was such as to render him incapable of forming and entertaining the design to take life, then the jury can not find him guilty of murder.

“4. Moral insanity is recognized by the law; and if the jury believe, from the evidence, that the defendant was morally insane when he stabbed Eliza Embry, then he is not guilty.

“5. If the jury believe, from the evidence, that the defendant knew right from wrong when he stabbed Eliza Embry, they must further find that he had the power to refrain from the wrong, or they must acquit him.

“6. A man morally insane, acting from an irresistible and uncontrollable impulse, is not responsible for that act; and if the defendant was in that condition, and was so acting at the time of the killing, he must be acquitted.

“7. If, at the time of the killing, the defendant's intellectual power was for the time overwhelmed by violent mental disease, he must be acquitted.

“8. If, by the overwhelming violence of sudden mental disorder, the defendant's intellectual power was obliterated, at the time of the killing, the jury must acquit him.

“9. If, by the overwhelming violence of sudden mental disorder, no matter what may have caused such disorder, the defendant's intellectual power was obliterated at the time of the killing, he must be acquitted.

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"10. Did the defendant, in committing the homicide, act from an irresistible and uncontrollable impulse? If so, the act was not that of a voluntary agent, but the involuntary act of his body, without the concurrence of a mind directing it; and he must, therefore, be acquitted.

"11. If the jury have a doubt of the sanity of the defendant at the time of the killing, they can not find him guilty of murder in the first degree, and sentence him to be hung.

"12. If the jury have a reasonable doubt as to the sanity of the defendant at the time he killed Eliza Embry, they can not find him guilty of murder in the first degree, and sentence him to be hung.

13. If the jury believe, from the evidence, that the defendant loved Eliza Embry, and that she had promised to marry him, but had been married to another man a few moments before the defendant killed her; they can look to these facts in determining the motive with which the deed was done, and in determining what, if any, is the degree of the defendant's guilt."

The court refused each of these charges as asked, and the defendant excepted to their refusal.

GEO. W. PARSONS, for the prisoner.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—It was proposed to prove in this case, by Charley Boswell, a witness for defendant, that, during the month immediately preceding the homicide, defendant "slept very little during the nights he was at home; that he was restless at night, and spent much time in walking the floor, and complained of being unable to sleep." The plea of insanity was relied on in defense; and if this question were so presented that we could consider it, we would be inclined to hold that the evidence ought to have been received. Sleeplessness and nervous restlessness are admissible evidence on questions of sanity *vel non*. Inconclusive, of course; for, in much the larger number of persons thus affected, there is no trace of mental unsoundness. The causes of it are very various. Still, it is a circumstance, although in many cases very slight, to be weighed by the jury.

But we can not pronounce that the Circuit Court erred in this ruling. The testimony was offered in connection with other evidence clearly inadmissible; offered in one continuous sentence, without any stop, or mark of separation. At the end it is said, "The State objected to this testimony, as it was offered, and the court sustained each objection, and

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the defendant separately excepted." This is too indefinite. We can not certainly know what were the separate parts, into which this mass of testimony was proposed to be divided; and hence we are left in doubt as to what was the subject of each and every exception reserved. To be the subject of revision here, the exception must clearly point to what it refers.—*Donnell v. Jones*, 13 Ala. 490; *Newton v. Jackson*, 23 Ala. 705; 1 Brick. Dig. 886, § 1186.

It is certainly true that insanity, properly proved, is a complete answer to a criminal charge. An unsound mind can not form a criminal intent; and as crime includes both act and intent, an indispensable constituent is wanting, when the mind of the perpetrator is diseased in that degree, which is, by the law, pronounced insanity. Few subjects have, in later times, been more discussed than diseases of the mind. The tendency of modern research has been to accord to mental disorders a wider scope, than was formerly acknowledged. Care must be maintained, however, that in commiserating and protecting this pitiable class, which appeals so loudly to our sympathies, we do not break down all legal barriers to crime, and leave society at the mercy of those whose evidence of insanity consists in their supreme depravity. No defense, perhaps, is more easily simulated than this; and hence, when presented, its evidences should be carefully and considerately scanned: not with a foregone conclusion to disallow it, as a pretense; not with an undue bias in its favor; but with a firm determination, without partiality or prejudice, to give to the testimony submitted its due weight; nothing more, nothing less.

The questions, what degree of insanity will excuse crime; on whom, and to what extent, is cast the duty of making good, or of overturning the defense of insanity in a criminal prosecution, and the measure of proof necessary to that end, have caused the greatest contrariety of judicial opinion. The case of *McNaghten*, 10 Cl. & Fin. 200, came before the British House of Lords for trial; and their lordships submitted certain questions to the judges of England, which were answered by Lord Ch. J. TINDALL, speaking for all the judges, except Mr. Justice MAULE, who delivered a separate opinion. Among the questions propounded were the following:

1. "What is the law respecting alleged crimes, committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane de-

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lusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit.

2. "What are the proper questions to be submitted to the jury, when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defense."

3. "In what terms ought the question to be left to the jury, as to the prisoner's state of mind, when the act was committed."

4. "If a person, under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused."

The answer of the judges was confined to the letter of the questions. They said: "In answer to the first question, assuming that your Lordships' inquiries are confined to those persons who labor under such partial delusion only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of, with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression, we understand your Lordships to mean, the law of the land. As the third and fourth questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jury ought to be told, in all cases, that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved, that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the deceased, solely and exclusively, with

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reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential, in order to lead to a conviction; whereas, the law is administered upon the principle, that every one must be taken conclusively to know it, without proof that he does know it. If the accused were conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been, to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require. The answer to the fourth question must, of course, depend on the nature of the delusion; but, making the same assumption as we did before—namely, that he labors under such partial delusion only, and is not in other respects insane—we think he must be considered in the same situation, as to responsibility, as if the facts with respect to which the delusion exists were real. For example, if, under the influence of delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his defense was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.”

Mr. Justice MAULE answered the first of the questions propounded in the negative. His language was: “There is no law, that I am aware of, that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime, on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong.”

It must not be overlooked, that the judges were considering a case of partial insanity; the case of a person afflicted with “insane delusion in respect of one or more particular subjects or persons.” And the opinion most favorable to the accused—that of all the judges except Justice MAULE—was, that insane delusion was no justification or excuse of homicide, unless the perpetrator was insanely deluded into the belief of the existence of a fact, or state of facts, which, if true, would justify or excuse the homicide, under the law as applicable to sane persons.

The case from which we have extracted so largely was
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heard before the House of Lords in 1843. Lords BROUGHAM, CAMPBELL, COTTENHAM and WYNFORD expressed gratification at the answers given by the judges. LYNTHURST, then Lord Chancellor, presiding over that august court, said: "I agree that we owe our thanks to the judges, for the attention and learning with which they have answered the questions now put to them." The law of England, on this very delicate question, had been declared, in a very decided majority of important cases, substantially as announced by Mr. Justice MAULE; though, in some of the earlier cases, a severer rule and measure of proof were exacted, where insanity was relied on as a defense.—See the authorities collected and collated in 1 Russ. on Crimes, 9 to 14.

The case of *Hadfield*, a very celebrated trial for attempting to take the life of the King, seems to have been made somewhat an exception to the rule. This is the case in which Lord ERSKINE made his celebrated argument. We cannot find the report of it in our library; but in 1 Russ. on Crimes, 12, will be found a summary of the evidence, and the ruling of Lord KENYON on the main question. The prisoner had been severely wounded in battle, and there was strong evidence that, both before and after the assault, he had insane delusions of very pronounced character. The attempt was made in the theatre. It was proved, that the prisoner "sat in his place in the theatre, nearly three-quarters of an hour before the king entered; that at the moment when the audience rose, on his majesty's entering his box, he got up above the rest, and presented a pistol loaded with slugs, fired it at the king's person, and then let it drop; and when he fired, his situation appeared favorable for taking aim, for he was standing upon the second seat from the orchestra in the pit, and he took a deliberate aim by looking down the barrel, as a man usually does when taking aim. On his apprehension, amongst other expressions, he said, that he knew perfectly well that his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer, he supposed. These words he spoke calmly, and without any apparent derangement; and with equal calmness repeated that he was tired of life, and said that, his plan was to get rid of it by other means; he did not intend anything against the life of the king; he knew the attempt only would answer his purpose." These facts showed, not only that he knew right from wrong; not only that he knew he was committing a crime against the law, by which he would forfeit his life; but it exhibited deliberation, and the exercise of the reasoning faculty. Lord KENYON held, that "as the prisoner was de-

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ranged immediately before the the offense was committed. it was improbable that he had recovered his senses in the interim ; and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed ; yet, there being no reason for believing him to have been at that period a rational and accountable being, he ought to be acquitted." He was acquitted.

This celebrated case suggests several reflections, by which we may be profited in the administration of the law. The first is, that the workings of a diseased mind are so variant, that it is difficult to lay down an absolute rule for the government of all cases. Each case must depend, more or less, on its own particular facts. And such is the language of the adjudged cases. In the next place, the charge to the jury should be so shaped, as to apply, as far as the law will allow, to the facts of the case on trial. Third, that calmness, indifference to results, consciousness of the moral or legal criminality of the act, with connectedness in the employment of the reasoning faculty, while not conclusive evidence of sufficient sanity to justify criminal punishment, are nevertheless strong circumstances tending to prove legal accountability.

In *Hadfield's case*, we infer from the language of the court, that he would have been adjudged sane and accountable, if it had not been shown that, a very short time preceding the attempt on the king's life, he had shown unmistakable symptoms of insanity. So that his case can scarcely be classed as an exception to the rule, which requires the insanity which excuses to be proven to have existed at the very time the act complained of was committed. The cool, calm, indifferent conduct of the prisoner, his consciousness of right and wrong, were, neither nor all of them, evidences which Lord KENYON regarded as proving insanity. He treated them as *indicia* of sanity, to be overcome. The recent, clearly proved insanity of the prisoner, caused him to believe that, in that case, reason had not re-asserted her dominion. From it he inferred the continued presence of insane delusion, when the causeless, and seemingly unaccountable attempt, was made on the life of the king. So, to justify the inference of insanity from the calmness of manner, and indifference to consequences, which sometimes mark the conduct of the manslayer, there should be convincing evidence of previous insanity, or insane delusions, so recent as coupled with the causelessness of the killing, to raise the presumption that the paroxysm had not entirely passed away.

The doctrine in regard to partial insanity, asserted by the English judges in *McNaghten's case*, was affirmed in a very

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able opinion by Chief Justice SHAW, in *Commonwealth v. Rogers*, 7 Mete. 500. And the same principle is asserted by Wharton in his work on Homicide, § 566, citing many authorities in support of it; and in 2 Greenl. Ev. § 372. See, also, *Franklin v. People*, 52 N. Y. 467; *Spann v. The State*, 47 Geo. 553; *People v. McDonnell*, 47 Cal. 134; *Blackburn v. The State*, 23 Ohio St. 146.

There is a species of mental disorder, a good deal discussed in modern treatises, sometimes called "irresistible impulse," "moral insanity," and perhaps by some other names. If, by these terms, it is meant to affirm that a morbid state of the affections or passions, or an unsettling of the moral system, the mental faculties remaining meanwhile in a normal, sound condition, excuses acts otherwise criminal, we are not inclined to assent to the proposition. The senses and mental powers remaining unimpaired, that which is sometimes called "moral," or "emotional insanity," savors too much of a seared conscience, or atrocious wickedness, to be entertained as a legal defense. GIBSON, C. J., in *Commonwealth v. Mosler*, 4 Barr, 264, while recognizing the existence of moral or homicidal insanity, as "consisting of an irresistible inclination to kill, or to commit some other particular offense," adds: "There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but can not avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance." With all respect for the great jurist who uttered this language, we submit if this is not almost, or quite, the synonym of that highest evidence of murderous intent known to the common law: a heart totally depraved, and fatally bent on mischief. Well might he add: "The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or, at least, to have evinced itself in more than a single instance. The frequency of this constitutional malady is fortunately small; and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order, as well as personal safety. To establish it as a justification in any particular case, it is necessary to show by clear proof, either its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature." What is meant by "evinced itself in more than a single instance," and how this principle would work in administration, we are left to speculate. Can that be a sound legal

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principle, whose 'general recognition would destroy social order, as well as personal safety'? We concur with Mr. Wharton (Honi. § 574), that moral insanity, which consists of irresistible impulse, co-existing with mental sanity, "has no support either in psychology or law."

On the question of the duty and measure of proof on questions of insanity, as a defense in a criminal trial, some rulings have been made in this court. In *State v. Marler*, 2 Ala. 43 (a case of murder), the Circuit Court had charged the jury, "if the facts necessary to constitute the crime of murder had been established by the proof, that it devolved upon the prisoner to prove his insanity at the time of the commission of the act; and if the jury, from the evidence, entertained a reasonable doubt of the prisoner's insanity at the time of the commission of the act, and believed also that it would be murder in him, it would be their duty to find him guilty of murder." The court had been requested to instruct the jury, that a reasonable doubt of the sanity of the prisoner required his acquittal. This court (ORMOND, J.) quoted from the language of MANSFIELD, C. J., in *Bellingham's case*, as follows: "That in order to support such a defense, it ought to be proved by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong; that in fact it must be proved beyond all doubt, that, at the time he committed the act, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity, which would excuse murder or any other crime." Judge ORMOND added: "These opinions, which are undoubted law, show the stringent nature of the evidence, by which insanity must be proved, to be an excuse for crime; but we do not understand that even this defense must be established by evidence so conclusive in its nature, as to exclude every other hypothesis. This would be requiring something akin to mathematical proof, of which the subject is clearly not susceptible; but the jury must be fully satisfied that the defense is made out, beyond the reasonable doubt of a well-ordered mind. To test the case at bar by these principles, the court was moved to charge the jury, 'that if they entertained any reasonable doubt as to the sanity of the prisoner, they must acquit him'; which charge the court refused. Upon the principles here laid down, it was error to refuse this charge. . . . It would have been highly proper that the court, when called on thus to charge, should have explained to the jury that this defense was required to be made out by strong, clear and convincing proof; and guided by these considerations, if they still entertain a

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reasonable doubt of the sanity of the prisoner, it was their duty to acquit."

We confess ourselves unable to reconcile the two propositions of this charge. Under the one, the defense of insanity is required to be made out by strong, clear, and convincing proof; under the other, the evidence is sufficient, if it generates a reasonable doubt. If reasonable doubt of the existence of a fact, is equivalent to strong, clear, and convincing proof of its existence, then the charge can be reconciled and understood. With every respect for the able jurist by whom this opinion was delivered, we fear its tendency would be to confuse and mislead the jury. C. J. COLLIER dissented, saying: "A reasonable doubt whether the accused was sane, would not authorize his acquittal. There must be a preponderance of proof to show insanity, to authorize a verdict of not guilty for that cause."

In the case of *Brinyea v. The State*, 5 Ala. 241, the same judges presiding, on the question of insanity as a defense, the Circuit Court had charged the jury, that "the prisoner was bound to make out by testimony, beyond all reasonable doubt, that he was insane at the time the act was committed; by proof clear, strong, and convincing; and if, upon the testimony, the jury should entertain no reasonable doubt of the defendant's sanity, they should find him guilty." It will be observed that, in this case, the rule laid down by the Circuit Court, as to the measure of proof of insanity required of the prisoner, was, that it should be shown beyond all reasonable doubt; and to this the court added: "If the jury entertained no reasonable doubt of the prisoner's sanity, they should find him guilty." This court, in commenting on this charge, said: "The objection to the charge can not avail the prisoner, as it is in strict accordance with the rule declared in *Murler's case*. . . . The prisoner then was bound to make out, by testimony, beyond all reasonable doubt, that he was insane at the time the act was committed; by proof strong, clear, and convincing. . . . The charge, it is true, is in the negative—that if the jury had no reasonable doubt of the sanity of the prisoner, he should be convicted. This, as it seems to us, is precisely equivalent to a charge, that if a reasonable doubt of his sanity was entertained, the jury should acquit." This charge, then, as construed by this court, and its correctness affirmed, re-asserts the two propositions, which we have said above we can not reconcile. It goes even further, and affirms that insanity, as a defense, must be proved beyond a reasonable doubt; and then adds, if the testimony generates a doubt of its existence, this is sufficient. Rules of law ought not to be so de-

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clared, as to leave the mind bewildered in their attempted solution. Instructions to juries should be clear, and freed from ambiguity.

In *McAllister v. The State*, 17 Ala. 434, this court (Ch. J. DARGAN delivering the opinion) said: "When the plea of insanity is interposed, to protect one from the legal consequences of an act which amounts to a crime, to render the defense available, the evidence must be such as to convince the minds of the jury that, at the time the act was done, the accused was not conscious that, in doing the particular act, he was committing a crime against the laws of God and his country. If he knew right from wrong, and knew that he was violating the law, he is then guilty; for it is this conscious knowledge, connected with the act, that constitutes the crime." We feel at liberty to affirm that the question of the measure of proof, on the defense of insanity, is not settled in this court.

Much has been written, and there is much hypercriticism in the discussion of the propositions, that, in criminal prosecutions, the *onus* is never shifted, and that the presumption of innocence accompanies the prisoner through all the stages of his trial. These are valuable canons of the law, but, like most other general rules, are subject to some modifications in their application, the observance of which is essential to the good order and well-being of society. Murder, at common law, is made up of two ingredients, the act and the intent. All men are presumed to intend the natural result of their voluntary acts. The voluntary employment of a deadly weapon, lying in wait, the administration of poison, each supplies the presumption, which, unexplained, is proof of the intent, or malice aforethought, which stamps the homicide as murder. Proof of the killing and the manner of it accomplishes the purpose of establishing the *factum* or act, and the felonious intent, or formed design with which it is done, unless, in the testimony which proves the act, or in some other proof, the offense is extenuated or excused. The common-law definition of murder declares, that the malice which characterizes its bad eminence may be implied, as well as expressed. So, one found in possession of goods, proven to have been recently stolen, is presumed to be the thief, until explanation of his possession is given. Many statutes which create offenses out of certain acts, unless certain conditions exist, cast on the accused the duty of excusing himself, by proof of the required conditions. In this class are the offenses of carrying deadly weapons concealed about the person, and retailing spirituous liquors without license. So then there are cases in the law, where one material element

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of a crime is inferred from the proof which establishes the other, if there be before the jury only the testimony which establishes that other fact. We imagine, also, there is a distinction and a difference between the constituent facts which make up a given crime—murder, for example—and which facts are common to every case within the class, and those occasional, or exceptional questions of fact, which do not necessarily belong to the class, but may be termed the accidents of the case. That a reasonable creature in being was killed; that the prisoner on trial was the agent, or manslayer, and that he did the act with malice aforethought, express or implied, are facts necessary to be shown in every successful prosecution for murder. To this extent, and to each of these constituent, indispensable elements, the burden rests with the State to prove their existence, beyond a reasonable doubt. The presumption of innocence, in which all men are primarily panoplied, follows, and guards them through all the stages of the trial, until these uniformly constituent facts are established. The law, in its firm, yet conservative morality, declares that all men, who have attained to years of discretion, are presumed to be of sound mind; and without any proof of that fact, resting securely in the presumption of sanity, it adjudges the offender shall suffer its penalties. But, there are persons of mature years, whose minds are so diseased, as that they are incapable of discriminating between right and wrong; and this defense is set up, in avoidance of the facts which, otherwise, stamp the prisoner as a murderer. We here enter the field of the exceptional, the accidental; and inasmuch as the law presumes sanity, that presumption, like that of innocence, should prevail throughout the trial, until it is overcome. And whether the evidence of insanity arise out of the testimony which proves the homicide, or is shown *aliunde*, reason and analogy alike declare it is insufficient, until it overturns the presumption of sanity.

In *Commonwealth v. Eddy*, 7 Gray, 583, the court said: "The burden is on the commonwealth to prove all that is necessary to constitute the crime of murder. And as that crime can be committed only by a reasonable being—a person of sane mind—the burden is on the commonwealth to prove that the defendant was of sane mind when he committed the act of killing. But it is a presumption of law that all men are of sane mind; and that presumption sustains the burden of proof, unless it is rebutted and overcome by satisfactory evidence to the contrary. In order to overcome this presumption of law, and shield the defendant from legal responsibility, the burden is on him to prove to the satisfac-

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tion of the jury, by a preponderance of the whole evidence in the case, that, at the time of committing the homicide, he was not of sane mind."

Pennsylvania stands unmistakably committed to the same doctrine:—*Ortwein v. Commonwealth*, 76 Penn. State, 414. The opinion is both able and philosophic. Says AGNEW, C. J.: "Insanity is a defense. It presupposes the proof of the facts which constitute a legal crime, and is set up in avoidance of punishment. Keeping in mind, then, that an act of willful and malicious killing has been proved, and requires a verdict of murder, the prisoner, as a defense, avers that he was of unsound mind at the time of the killing, and incapable of controlling his will; and therefore that he is not legally responsible for his act. . . . Soundness of mind is the natural and normal condition of men, and is necessarily presumed; not only because the fact is generally so, but because a contrary presumption would be fatal to the interests of society. No one can justly claim irresponsibility for his act contrary to the known nature of the race of which he is one. He must be treated and be adjudged to be a reasonable being, until a fact so abnormal as a want of reason positively appears. It is, therefore, not unjust to him, that he should be so conclusively presumed to be, until the contrary is made to appear on his behalf. To be made so to appear to the tribunal determining the fact, the evidence of it must be satisfactory; and not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature." To the same effect are *The State v. Smith*, 53 Mo. 267; *People v. McDonnell*, 47 Cal. 134; *State v. Lawrence*, 57 Me. 574; *Leoffner v. The State*, 10 Ohio St. 599; *State v. Starling*, 6 Jones, N. C. 366; *State v. Felter*, 32 Iowa, 50; *McKenzie v. The State*, 26 Ark. 332; Wharton on Hom. § 665; 2 Greenl. Ev. § 373. Mr. Wharton, in his work on Homicide, § 666, classes New York among the States that hold insanity is a defense, the affirmative proof of which rests with the defendant. The question, we think, is somewhat unsettled there.—*Flanagan v. People*, 52 New York, 467.

There are respectable authorities to the contrary, but we decline to follow them. We hold, then, that insanity is a defense which must be proven to the satisfaction of the jury, by that measure of proof which is required in civil causes; and a reasonable doubt of sanity, raised by all the evidence, does not authorize an acquittal. The doctrine we have been combating is, we think, purely American; and we regard it as an erroneous application of the principle of presumed

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innocence. One disputable presumption should not be allowed to override and annihilate another.

Under the rules above declared, the entire affirmative charge of the Circuit Court is free from error. Of the charges asked by defendant, those numbered 1, 2 and 3 were abstract, there being no evidence to support them; those numbered 4, 5, 6, 10, 11, 12, 13, were all rightly refused, under the principles we have declared above; charges 6, 7 and 8 were calculated to mislead the jury, if they were not abstract, and were rightly refused; the two charges given at the instance of the prosecution, are free from error; and the judgment of the Circuit Court must be affirmed.

It is therefore ordered and adjudged that, on Friday, the eleventh day of June, 1880, the sheriff of Talladega county execute the sentence of the law, by hanging the said George Boswell by the neck until he is dead,

BRICKELL, C. J., dissenting.

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Bill in Equity for Foreclosure of Mortgage.

1. *Decree against non-resident, on publication.*—A decree against a non-resident defendant, founded on a decree *pro confesso* rendered on publication only, without any appearance, will not be reversed on error, because it fails to require the defendant, before executing it, to give the statutory bond (Code, § 3834); nor because the chancellor did not direct a copy of the decree to be sent to the defendant.

2. *Description of mortgaged premises in bill.*—In a bill to foreclose a mortgage on lands, reasonable certainty in the description of the premises is all that is required. "One thousand and twenty acres of land, more or less," the greater part described by the numbers of the United States survey, with the additional words, "all lying west of the stage road between Seale's Station and Oliveville, and bonded on the north by Mrs. L.'s lands, on the south by P.'s place, and on the west by I. & L., and all lying in said county," is sufficiently accurate and definite.

3. *Setting aside decree, and reinstating it.*—When a final decree is set aside in vacation, on the petition of the non-resident defendant, and at the next term this order is set aside, and the petition dismissed, the original decree is thereby restored.

APPEAL from the Chancery Court of Russell.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 6th July, 1877, by Joseph G. Blount, against John W. Hurt; and sought to foreclose a mortgage on a tract of land, which was thus de-

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scribed in the bill: "a mortgage on one thousand and twenty acres of land, more or less, described as follows: section twenty-four (24), township fourteen (14), and range twenty-eight (28); also, the north half of section twenty-five (25), township fourteen (14), range twenty-eight (28), and a part of section nineteen (19), township fourteen (14), range twenty-nine (29); all lying west of the stage road between Seale's Station and Glennville, and bounded on the north by Mrs. Leonard's lands, on the south by Pitt's place, and on the west by Illges & Ledbetter, and all lying in Russell county." The complainant and defendant both resided in Atlanta, Georgia; and publication was duly made against the defendant, as a non-resident. At the September term, 1877, on proof of the due publication of the order, a decree *pro confesso* was entered against the defendant; and on a subsequent day of the term, the cause being submitted for final decree, on the bill and exhibits and decree *pro confesso*, the chancellor rendered a decree for the complainant, for the amount shown by calculation to be due on the note secured by the mortgage, and ordered a sale of the lands by the register, unless the amount was paid within thirty days. The decree then proceeded: "And it appearing that the defendant is a non-resident of the State, and that this decree is founded on a bill taken *pro confesso*, without personal service; it is ordered, that the decree be suspended until the complainant shall execute, or cause to be executed, a bond to account for the rents, value and profits of said lands transferred by operation of this decree, and further to abide by and perform such decree as the court may render, if this decree is set aside, as provided by section 3401 of the Revised Code."

In vacation, August, 1878, the defendant presented his petition, duly verified by affidavit, to the chancellor, alleging that he had a defense to the bill, and that a copy of the decree had never been served on him, and asking to be allowed to answer and defend; and the chancellor thereupon, by an interlocutory decree at chambers, rendered on the 30th August, 1878, ordered the final decree to be set aside, and the cause to be reinstated on the docket, and that the defendant be let in to defend. At the ensuing October term, 1878, on proof that a copy of the decree had been served personally on the defendant by the sheriff, this interlocutory decree was set aside, and the petition was dismissed.

The errors now assigned by the defendant are: 1. The description of the lands in the bill, and in the mortgage, is not sufficient to authorize a decree of sale. 2. That no amount was fixed by the chancellor, for which a refunding bond should be given. 3. That the court failed to require a

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copy of the decree to be sent to the defendant, as required by section 3397 of the Revised Code. 4. There is no final decree in the cause, authorizing a sale of the lands; the decree having been set aside, and no final decree since rendered. 5. There was not sufficient proof to authorize the decree *pro confesso*.

SAMFORD & CHILTON, for appellant, cited *Williams v. Roe*, 59 Ala. 629; *Lang v. Pace*, 42 Ala. 495; Rev. Code, § 3337; 5 Ala. 158; 11 Ala. 668; 17 Ala. 681.

WATTS & SONS, *contra*.

BRICKELL, C. J.—In *Holly v. Tell, adm'r, &c.*, at the present term, we held, that a decree final, founded on a decree *pro confesso*, rendered on publication against a non-resident, was not reversible, because the complainant was not required, before executing the decree, to give the bond prescribed by section 3834 of the Code of 1876; nor was it a reversible error, that the chancellor did not direct a copy of the decree to be sent to the defendant.

2. The description of the mortgaged premises, in the original bill, is not vague or indefinite. The greater part of them are described by the survey of the United States land-office. The whole tract can be ascertained and identified by its designation as the farm of the mortgagor in Russell county, and by its location as lying west—that is, bounded on the west—by the stage road between Seale's Station and Glennville. Reasonable certainty of description is all that is required in a bill to foreclose.

3. A vacation of the order setting aside the original decree, which order had let in the defendant to make defense, of necessity restored the original decree.

We have noticed all the points presented by the argument of appellant's counsel, and do not find them available to reverse the decree.

The judgment is affirmed.

[Nelms and Wife v. Armstrong & Co.]

Nelms and Wife v. Armstrong & Co.*Action against Husband and Wife, for Price of Necessaries.*

1. *Sufficiency of verdict.*—In an action against husband and wife, seeking to charge the wife's property, particularly described, and alleged to belong to her statutory separate estate, with the price of necessary family supplies sold and delivered (Code, § 2711); a verdict, finding the issue in favor of the plaintiffs, assessing their damages at a specified sum, and further finding "the following separate estate to belong to" the wife, is sufficient to support a judgment for plaintiffs, although it does not, in words, find that the property belongs to the statutory separate estate of the wife.

APPEAL from the Circuit Court of Lee.

Tried before the Hon. JAMES E. COBB.

GEO. D. & G. W. HOOPER, for appellants.

MANNING, J.—This was an action by Armstrong & Co., against appellants, to recover of the statutory separate estate of Mrs. Nelms the amount of an account for goods sold, which were "articles of comfort and support for the household" of defendants, "suitable to the degree and condition in life of their family, and for which the said husband . . . would be responsible at common law." The complaint then avers, that certain property, described therein, was of the statutory separate estate of the wife, when the goods were sold, and at the time of the bringing of the suit.

The only objection made to the judgment in favor of plaintiffs is founded on the verdict of the jury, who "find the issue in favor of the plaintiffs, and assess their damages at," &c., "and find the following separate estate to belong to Mary Nelms. to-wit," &c., describing property specified in the complaint. The contention is, that the verdict does not support the judgment, because the jury do not find that the property is of the statutory separate estate of Mary Nelms. But the verdict is in response to the complaint, and finds the issue in favor of plaintiffs; and an essential part of that issue, presented by the pleading, was that the property designated belonged to the statutory separate estate of Mrs. Nelms. A just construction of the verdict shows, that the jury found that the property in question was of her statutory separate estate.

Let the judgment be affirmed.

[Gilbert v. Dupree's Adm'r.]

Gilbert v. Dupree's Adm'r.

Bill in Equity to Foreclose Mortgage.

1. *Statutory separate estate of wife; how subjected to debts.*—The statutes creating the wife's statutory separate estate have clearly defined the debts to which it may be subjected, and the remedy by which the liability for those debts may be enforced (Code, §§ 2711-12); consequently, a mortgage given by husband and wife, to secure the payment of such a debt, can not be enforced in equity against her separate property thereby conveyed.

APPEAL from the Chancery Court of Randolph.

Heard before the Hon. B. B. McCRAW.

The bill in this case was filed on the 20th April, 1872, by Mrs. Lucy L. Dupree, since deceased, against William E. Gilbert and his wife, Mrs. Frances G. Gilbert; and sought to enforce and foreclose a mortgage on a tract of land, which the defendants had executed to the complainant, to secure the payment of a promissory note for \$600, which they had borrowed from her. The mortgage and note were dated the 13th November, 1869, and the note fell due on the 25th December, 1870. The lands conveyed by the mortgage belonged to Mrs. Gilbert, and were held by her as her statutory separate estate. The bill alleged that the money, for which the note and mortgage were given, was borrowed by the defendants to enable them to procure the necessities of life for themselves and their family, and was used by them in the purchase of such necessities; but the defendants, in their answer, denied these averments, and insisted that the transaction was a simple loan of money, for the payment of which the wife's statutory separate estate could not be subjected; and they also set up the defense of usury. There was a demurrer to the bill, for want of equity, which the chancellor overruled; and, on final hearing on pleading and proof, rendered a decree for the complainants, ordering a reference and account of the debt, and a sale of the mortgaged premises to pay the amount ascertained to be due. The overruling of the demurrer to the bill, and the final decree, are now assigned as error. The complainant died pending the appeal, and it was revived against her administrator.

C. D. HUDSON, for appellants.

W.M. H. DENSON, *contra*.

[Gilbert v. Dupree's Adm'r.]

MANNING, J.—In this cause, a bill in chancery was filed by Mrs. Dupree, now deceased, to foreclose by sale a mortgage of a half-section of land, the statutory separate estate of Mrs. Gilbert, a married woman, executed by Mrs. Gilbert and her husband, defendants in the cause, to secure payment of a note for six hundred dollars to complainant. The bill alleges, that “said William and Frances Gilbert were in very indigent and straightened circumstances, had not any provisions of any kind whatever, upon which to maintain themselves and family, and were perfectly destitute of all means, money, &c. with which to procure the necessaries with which to support themselves and their family; and that the said William and Frances did come to your oratrix with this story, and under these circumstances; and your oratrix charges, and avers, that she did loan them the six hundred dollars, for the purpose of buying and procuring necessaries, and articles of comfort of the said William and Frances and their household, suitable to the degree and condition in life of the said William and Frances and their family, and for which the said William, the husband of said Frances, and as head of his and her family, would be responsible at common law.”

The note for six hundred dollars, it appears, was given for a loan of five hundred dollars, for one year; and the land mortgaged was that on which the mortgagors resided, in Randolph county, while Mrs. Dupree lived in the city of Montgomery. The transaction was effected through a third person, and the parties themselves were not, so far as the record shows, acquainted with one another. The evidence tends to prove that the money was borrowed to enable Gilbert to carry on his farm work to advantage, and thereby provide for and support his family in the future, rather than for the purchase of necessaries then required; his need of such a loan, thus to support his family, being very strongly expressed to the person through whom it was obtained, and producing, probably, on his mind, an erroneous impression of present destitution of necessaries. At all events, it is not shown that the money was borrowed, or used, for the purchase of articles for the support of the household, under such circumstances as would make the wife's statutory separate estate liable, under the statute, to be charged with the payment of them.

But, if such proof had been made, this suit could not be sustained. The enactments relating to the statutory separate estates of married women do not relieve them of their common-law disability to make contracts, which shall impose upon them personal liabilities. The note to Mrs. Dupree

[Gilbert v. Dupree's Adm'r.]

received no force or validity, by having Mrs. Gilbert's name signed to it. "It was the debt, and only the debt, of her husband. She had not the power, or legal capacity, to bind herself personally for the payment of it, or to make it a charge upon her statutory separate estate," by signing and acknowledging the mortgage.—*Coleman v. Smith*, 55 Ala. 378. This "is now the settled law of this State; and it is also settled, that every such mortgage is forbidden by law, and void."—*Conner v. Williams*, 57 Ala. 134.

The section of the law which provides that the statutory separate estate of the wife may be made liable to a creditor, and under the operation of which the counsel who wrote the bill in this cause seemed to think the suit might be maintained, was as follows: "For all contracts for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, the separate estate of the wife is liable; to be enforced by *action at law*, against the husband alone, or against the husband and wife jointly." Rev. Code, § 2376. No personal judgment, though, can, in any such action, be rendered against the wife, or bind her personally; nor can her separate estate be charged with the payment of a debt contracted for such objects, in any other manner than as the statute provides.—*Raviesies & Wife v. Stoddart*, 32 Ala. 599. And so strictly has the statute, in this particular, been adhered to, that it has been decided that, without a judgment at law against the husband, although he be insolvent, establishing his liability by the common law for the debt, the separate estate which was of the wife cannot be subjected thereto after her death, by an action against her legal representative, although the things for which it was contracted were the articles described in the statute, "of comfort and support of the household, suitable to the degree and condition in life of the family," &c. *Rodgers v. Bazeale*, 34 Ala. 515-16. And it has been further ruled, that, in case of the death of an insolvent husband, leaving a wife surviving him, who had contracted on her own credit, and on the faith of her statutory separate estate, an account with complainant for articles of comfort and support of herself and family, the seller of the goods could not maintain a suit in chancery, even to obtain payment for them of such separate estate. "It must be borne in mind," the opinion says, "that the liability of the estate is purely statutory, having no existence independent of the statute, which defines and declares, and bounds and circumscribes it, by its own rules and limitations, and the courts cannot extend it." *O'Connor v. Chamberlain*, 59 Ala. 431. See, also, *Esbridge v.*

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Ditmar, 51 Ala. 249-50. In no view of this cause, can the suit be sustained.

Let the decree of the chancellor be reversed, and the bill be dismissed.

Smith v. Kennedy.

Action on Promissory Note, or Due-Bill.

• 1. *When note is not part of record.*—In an action on a promissory note, which, as copied in the transcript by the clerk, but without being made a part of the record by bill of exceptions, is variant from the note described in the complaint, this court will not look to it for any purpose, but will be governed by the averments of the complaint.

2. *Amendment of judgment, by correcting error in calculation of interest.*—On appeal from a judgment by *nil dicit*, in an action on a promissory note, a clerical misprision in the calculation of interest, being amendable *nunc pro tunc*, on motion, in the court below, will be amended by this court at the cost of the appellant, and the amended judgment affirmed.

APPEAL from the Circuit Court of Randolph.
Tried before the Hon. JOHN HENDERSON.

SMITH & SMITH, for appellant.

J. T. HEFLIN, *contra*.

STONE, J.—The due-bill copied in the record states it is dated and due June 24th, 1874. This is no part of the record. The complaint avers it is dated and due January 24th, 1874. We must be governed by this. The complaint declares on a due-bill due January 24th, 1874, for \$606.70, with credits, August 24th, 1874, \$150, and February 26th, 1876, \$50. Judgment was rendered by *nil dicit*, without the intervention of a jury, on 23d February, 1878, for five hundred and ninety-six 65-100 dollars—\$596.65. The true amount then due, by calculation, was five hundred and seventy 69-100 dollars—\$570.69. This was a mere clerical error, and would have been amended *nunc pro tunc*, on a motion in the court below. We here reverse and render the judgment, awarding to the plaintiff the sum of five hundred and seventy 69-100 dollars damages, as of February 23d, 1878, the date of the judgment in the court below, which sum will draw interest from that date.—Code of 1876, § 3946; *Wade v. Kelly*, 2 Stew. & P.443; 1 Brick. Dig. 82, §§ 180 *et seq.* Let the appellant pay the costs of the appeal.

[Hurt v. Freeman.]

Hurt v. Freeman *et al.*

Bill in Equity for Foreclosure of Mortgage.

1. *Description of mortgaged lands in bill.*—In a bill for the foreclosure of a mortgage, the premises should be described with the same reasonable certainty as in a complaint in a real action at law. "About one thousand and fifty acres, bounded as follows," specifying the boundaries on three sides only, and stating no fact from which the boundary on the fourth side can be ascertained, is not a sufficiently accurate and definite description.

Appeal from the Chancery Court of Russell.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 2d January, 1877, by James C. Freeman, as trustee for several minor children, who were joined with him as complainants in the bill, against John W. Hurt and others; and sought, among other things, the foreclosure of a mortgage given by said Hurt to Freeman, as trustee, to secure the payment of a note for money loaned. On final hearing, the chancellor rendered a decree for the complainants, ordering a sale of the mortgaged lands, &c.; and this decree is now assigned as error, by the defendant Hurt. The single point considered by this court renders it unnecessary to state the facts at length.

SAMFORD & CHILTON, for appellants, contended that the description of the land in the bill, and in the mortgage, was not sufficiently definite to support a decree of sale; citing *Williams v. Roe*, 59 Ala. 629; *Long v. Pace*, 42 Ala. 495.

WATTS & SONS, *contra*.

BRICKELL, C. J.—A bill for the foreclosure of a mortgage should so describe the mortgaged property, that, if a sale is ordered, the officer of the court may with certainty and safety execute the decree, and that purchasers may be informed of the particular premises which are exposed to sale, and which they can acquire.—*Long v. Pace*, 42 Ala. 495; *Williams v. Roe*, 59 Ala. 629; *Whitney v. Beal*, 5 Blackf. 143. If the mortgage is not certain in its description of the premises upon which it operates, and it is capable of being rendered certain by reference to extrinsic facts, these facts should be averred in the bill.

[Thurman v. Stoddard & Co.]

Following the description in the mortgage, the bill states the premises as certain lands, lying in the county of Russell, in the State of Alabama, "about one thousand and fifty acres, and bounded as follows: On the north by Mrs. Leonard; on the south by S. Pitts; on the west by Illges & Ledbetter." This description is too vague. We do not mean, that it is so uncertain and indefinite as to affect the validity of the mortgage. It can, doubtless, be rendered certain by a proper description of the lands intended to be conveyed. The same certainty of description ought to be observed in a bill for foreclosure, as in a complaint in a real action at law, and in the judgment rendered thereon. In such action, reasonable certainty of description is necessary.—*Sturdevant v. Murrell*, 8 Porter, 317; *Bennett v. Morris*, 9 Porter, 171. The boundaries of the land on the north, south and west are given, but not on the east, and no fact is stated from which the eastern boundary can be ascertained. If the quantity of the land was stated, the eastern boundary could, perhaps, be located. But that is not specified—it is stated as *about* (meaning *more or less than*) *one thousand and fifty acres*; indicating that a particular tract of land, without regard to *quantity*, was in the contemplation of the pleader, and of the mortgagor and mortgagee.—*Winston v. Browning*, 61 Ala. 80. The defect in the bill in this respect compelling a reversal of the decree, it is not necessary to notice the other matters presented by the assignment of errors.

Reversed and remanded.

Thurman *et al.* v. Stoddard & Co.

Bill in Equity for Foreclosure of Mortgage.

1. *When mortgagee is bona fide purchaser for value.*—When a mortgage is given simply as security for a pre-existing debt, the time of payment not being extended, nor any new consideration intervening, the mortgagee is not entitled to protection, as a *bona fide* purchaser for valuable consideration, against an equitable title or claim of which he had no notice; *secus*, when the day of payment is extended in consideration of the mortgage.

2. *Vendor's lien; against whom asserted.*—A vendor's lien on land, for the unpaid purchase-money, can not be asserted against a *bona fide* purchaser for valuable consideration without notice.

APPEAL from the Chancery Court of Lee.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 6th July, 1874, by

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E. B. Stoddard, a merchant doing business in Charleston, South Carolina, under the name of E. B. Stoddard & Co., against John W. Mills and W. D. Thurman; and sought to foreclose a mortgage executed by said Mills to the complainant. The mortgage was dated the 8th March, 1873; was given to secure the payment of a promissory note for \$782.13, of even date with the mortgage, and payable by the first day of November next after its date, which recited as its consideration an indebtedness for goods sold and delivered; conveyed a tract of land in Lee county, containing one hundred and four acres, and a lot or lots in the village of Waucoochee in said county, on which were situated a dwelling-house, office, blacksmith shop, &c.; was signed by said Mills and his wife, and attested by said W. D. Thurman, as one of the subscribing witnesses. The bill alleged that Thurman was in possession of the town property, and that he had bought it from Mills with full knowledge of the mortgage. This property had been sold and conveyed by Thurman to Mills, prior to the execution of the latter's mortgage to the complainant; but, a part of the purchase-money being unpaid, and Mills finding himself unable to pay it, the contract between them was rescinded, some time after the execution of the mortgage, and Thurman entered into the possession of the property. Thurman set up these facts in his answer, and claimed a vendor's lien for the unpaid purchase-money due him; and he asserted that, when he attested the mortgage to the complainant, he did not know that this property was included in it. A claim of homestead exemption, in the other land conveyed by the mortgage, was set up by Mills and his wife; and a cross-bill was filed to assert it. The chancellor held, that the defendants were severally estopped from setting up these defenses; and he therefore rendered a decree for the complainant, ordering a sale of the mortgaged lands. From this decree Thurman only appeals, and he assigns it as error, so far as it subjects the lands claimed by him to sale under the mortgage.

SAMFORD & CHILTON, for appellant.

BRICKELL, C. J.—Errors are assigned only by the appellant William D. Thurman; and of consequence, it is only necessary to consider the correctness of the decree so far as it may affect him. The question does not seem to us, as is argued by his counsel, whether he has estopped himself from asserting the equitable lien, which, as a vendor, he may have on parts of the mortgaged premises, by his attestation of the mortgage, without disclosing it; but rather, whether the

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mortgagee is not a *bona fide* purchaser without notice, having the legal estate, against which the equitable lien can not prevail. The mortgage was given as security for a pre-existing debt; and if the time of payment of the debt had not been extended, nor any other new consideration had intervened, the mortgagee would stand simply in the place of the mortgagor, having no other right or equity. But, in consideration of the mortgage, forbearing the payment of his debt, extending the day of payment, he changes his condition and relation, and is entitled to protection as a *bona fide* purchaser. There is no pretense that he had any notice of the equity of Thurman as a vendor, and it can not be asserted against him.—1 Jones on Mortgages, § 459.

The decree is affirmed.

Geiger & Co. v. Hussey.

Statutory Action by Material-Man to Enforce Lien.

1. *Statutory lien of material-man.*—Under the statute giving a lien to mechanics, employees, and material-men (Code, §§ 3440-3461), a lumber merchant, furnishing materials for any building, erection, or improvement on land, has a lien on such building, &c., and on the land on which it is situated, whether such materials are furnished to the mechanic who has contracted to do the work, or directly to the owner or proprietor under a contract made with him personally.

APPEAL from the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

This action was brought by R. W. Geiger & Co. against James Hussey, and was commenced on the 6th February, 1878. The complaint contained two counts; the first claiming \$221.78, "due by account, for work and labor done, and materials furnished for a building for said defendant by the plaintiffs, at his request, to-wit, on the 2d November, 1877;" and the second, as amended, being in these words: "Plaintiffs claim of defendant the further sum of \$221.78, due by account, and fully set forth in the account hereto annexed and made a part of this complaint; the said sum being for materials furnished by plaintiffs for the building and erection of a dwelling-house and other improvements on the lot of land hereinafter described; which materials furnished *was* (?) by virtue of an original contract with, and at the request of said defendant, who is the owner of the said lands hereinaf-

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ter described; that the items of this claim are fully set forth and correctly stated, in the account hereto annexed; that all of said materials were used in the erection of the house, and making the other improvements on said land, which was furnished by said plaintiffs at the request of said defendant. Said lot of land is situated in the city of Mobile, and described as follows," &c. "Plaintiffs further aver, that said account was made out by *him*, and verified by *his* oath, and duly filed with the judge of probate of said county, within six months from the furnishing of said materials and lumber used in building said house and making said improvements. No part of said claim has been paid. An affidavit was attached to said account, showing when the same was due; and *he* now claims, and moves the court by its judgment to declare, a lien on said land and house, and improvements erected thereon, for the payment of said claim, with the interest thereon; and that the court will order the same to be levied on for the satisfaction thereof, as provided by an act of the General Assembly of Alabama, entitled 'An act to establish and regulate the lien of mechanics and other persons,' approved March 6, 1876; provided said defendant does not pay the same, or it be not satisfied out of other property of defendant."

The account annexed to the complaint, as an exhibit to the second count, specifies the quantities and kind of lumber furnished, with the dates; showing the amount furnished in September, beginning on the 27th day of that month, to cost \$15.67; in October, \$189.63; and in November, \$15.48. The affidavit to the account was made on the 15th January, 1878, before the clerk of the Probate Court, by one of the plaintiffs, and states: "That James Hussey is justly indebted to said R. W. Geiger & Co. in the sum of \$220.78, for lumber, planks, boards, shingles and materials, furnished and sold said Hussey to build a house on a lot of land," which is particularly described, and alleged to have been conveyed to said Hussey by Daniel Wheeler on the 6th July, 1877; "that said lumber, planks, boards, shingles, and materials were furnished to said Hussey, from the 27th September, to the 2d November, 1877, and were furnished at the request of said Hussey; and that the said claim for lien on said land and building is filed within four months after said debt accrued, and said lien is claimed by virtue of an act of the General Assembly of Alabama, entitled 'An act to establish and regulate liens of mechanics and other persons,' approved March 6, 1876."

The defendant demurred to the second count, assigning as causes of demurrer—1st, "that said count fails to aver or

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show that plaintiffs were original contractors to erect, and did erect said house for defendant, and used the lumber themselves to erect said house;" 2d, "it fails to aver or show that there was any original contractor to build said house, and that there is a balance of the money due such contractor by the defendant;" 3d, "it fails to show sufficient facts to create a lien under the act referred to;" 4th, "because the complaint and attached account show only a simple-contract claim for lumber &c. sold." The court sustained the demurrer; and on issued joined, but on what plea the record does not show, the plaintiffs had a verdict and judgment on the first count of their complaint, for the amount claimed, with interest. "During the trial," as the bill of exceptions states, after the court had sustained the demurrer to the second count, "the plaintiffs offered to prove by F. A. Stoulz, one of said plaintiffs, all the allegations of said second count; and, on such proof being made, moved the court to enter up judgment in favor of plaintiffs, and against said defendant, not only for the amount found to be due by the jury, with the costs of court, but declaring a lien on the property described in the complaint, and directing the execution to be levied on the real property therein described, if no sufficient property of said defendant can be found to satisfy such judgment and costs, unless sooner paid. The defendant objected to this evidence, in so far as it was intended to establish a lien, and the court sustained the objection; to which the plaintiffs excepted. The court refused to admit the evidence offered by the plaintiffs, and refused to enter up judgment as asked by them; holding that, under the allegations of the complaint, they had no lien for the materials furnished, under the act referred to in the complaint; to which rulings and decisions plaintiffs excepted."

The sustaining of the demurrer to the second count, and the refusal to enter up judgment as asked, are now assigned as error.

OVERALL & BESTOR, for appellants.—The statute gives a lien to the material-man, for the price of the materials furnished, whether he deals directly with the owner, or indirectly through another contractor; the only difference being in the extent of his lien, and in the manner of enforcing it. When he deals directly with the owner, his lien is enforced against the owner and the building in a suit between them; but, when he deals through another contractor, he can only intercept the balance that may be due him. The lien law is founded on principles of public policy, and is intended to afford protection and a summary remedy to a meritorious

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class of citizens. All material-men are equally within its terms, and equally entitled to its protection. The terms of the statute, and the policy on which it is founded, extend alike to all.

BOYLES, FAITH & CLOUD, *contra*.—The statute is to be taken as a whole, and whoever claims the benefit of it must bring himself clearly within its terms. An analysis and comparison of its several parts shows a clear intention to give a lien to contractors who undertake to erect or repair a house, and to extend the benefit of that lien to the material-men, or other sub-contractors, employed by them, by allowing the latter to intercept and appropriate any balance due. But it never was intended to give a separate and independent lien on the building to every merchant who sold a pound of nails, a lock, or other articles used in its construction. Under such a construction, there might be a dozen or more original contractors, but no sub-contractors; and it would leave without any field of operation the provisions relating to the enforcement of the material-men's lien, and the distribution of the fund arising from a sale of the land. But, can the plaintiffs appeal from a judgment in their own favor? Ought they not to have taken a nonsuit with a bill of exceptions?

BRICKELL, C. J.—The only question of the case is, whether a lumber merchant, furnishing materials to the owner or proprietor of a vacant city lot, for the erection of buildings thereon, has a lien on the buildings and lot for the debt owing him. This depends on the true construction of chapter 6, title 2, part 3, of the Code of 1876, which is devoted to the "liens of mechanics, employees, and material-men, for any building, erection, or improvement upon land, or for repairing the same."

It is first declared; "Every mechanic, or other person, who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler, or machinery, for any building, erection, or improvement upon land, or for repairing the same, under and by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or sub-contractor, upon complying with the provisions of this chapter, shall have for his work or labor done, or materials, fixtures, engine, boiler, or machinery furnished, a lien, to the extent, and in the manner by this chapter provided, upon such building, erection, or improvements, and upon the lands belonging to such owner or proprietor, on which the same is situated; . . . and upon any balance due by the owner or proprietor to the contractor, to secure the payment

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for such work or labor done, or materials, fixtures, engine, boiler, or machinery, furnished as aforesaid," &c.

The next section declares the extent of the lien, as follows: "The entire land, to the extent aforesaid, upon which any such building, erection, or other improvement is situated, including as well that part of the land which is not covered with such building, erection, or other improvement is situated, . . . shall be subject to all liens created by this chapter in favor of the contractor, . . . and also in favor of all the employees of such contractor, and persons furnishing materials, to the amount of any unpaid balance due the contractor, by the owner or proprietor."

A succeeding section requires, that an original contractor, claiming the lien, shall, within six months, and every journeyman and day laborer within thirty days, and every other person, seeking to obtain the benefits of the statute, within four months after the indebtedness has accrued, shall file a verified statement with the judge of probate, &c. "If the claim so filed belongs to a laborer, sub-contractor, or material-man, then the lien shall be only to the extent of the unpaid balance in the hands of the owner or proprietor, at and after the notice of the same is given," &c. We have referred to all the provisions of the statutes which have any bearing on the question presented.

We may concede the proposition of the appellee, that whoever claims the benefits of the statute, must bring himself within its provisions—must show affirmatively that he is of the class of persons, and has a claim of the kind the statute intends to secure. The courts can neither extend nor narrow the privileges of the statute. It must be so construed as to embrace all cases (and no others), which are within the legitimate meaning of its terms. It is a just inference from *Welch v. Porter*, at the present term, that a material-man, furnishing materials, is within the provisions of the statute, and has a lien on the lot or buildings. The statute was intended to confer, and seems to us in unqualified terms to confer, a lien on three classes of persons—the mechanic, his employees, and the material-men. If the material-man supplies the materials under a contract, not with the owner or proprietor, but with the mechanic contracting with him, the lien extends only to the balance which may be due from him to the contractor. When the materials are supplied under a contract directly with the owner or proprietor, there is a lien (the requisitions of the statute being observed), not on the balance due the contractor, but upon the land, buildings, or other improvements, &c. There is no lien, in that case, upon the balance due the contractor,

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because there is no debt due from him. But for the debt due from the owner or proprietor, for the materials, fixtures, &c., which have passed into and contributed to the improvement of his land, enhancing its value, equally with the labor of the mechanic or his employees, the statute gives a lien. If the first section of the statute to which we have referred stood alone, this would not be questioned. The expressions in subsequent sections may not be so broad. We must look to the whole statute; and if, from the broader and larger expressions, we can collect the legislative intention, we must give effect to these expressions, notwithstanding other phrases, of less extensive import, in particular clauses. *Bymater v. Bradling*, 7 Barn. & Cressw. 660.

Unlike former statutes (R. C. § 3101-04), which embraced only mechanics and builders, the present statute extends not only to them, but to their employees, and to material-men. The latter class have a lien, not only when contracting with the owner or proprietor, but when furnishing the materials to the contractor, who contracts with him. The latter lien is worked out through the contractor, and extends only to the balances which may be due him from the owner or proprietor, for which the contractor has a lien if the requisitions of the statute have been pursued. When, without the intervention of the mechanic, materials are furnished, not to him, to enable him to do his work, or perform his contract, but to the owner or proprietor, that the building, erection, or improvement may be completed, there is a lien, independent of, and distinct from that of the mechanic.—*Winter v. Caldwell*, 14 How. 434; *Van Pelt v. Hartough*, 31 N. J. Law, 331.

This conclusion compels a reversal of the judgment of the City Court.

Reversed and remanded.

Shelton v. Merrill, Fitch & Allen.

Motion against Sheriff for Failure to Return Execution.

1. *Return day of execution, under general law, and special statute in Mobile.* Under the general statutes of the State, the return term of an execution is the term next after its date, except when it is issued less than fifteen days before the commencement of that term (Code, § 3191), and the sheriff is required to make return of the writ three days before the first day of the term; but, under the special statute regulating the practice in the Circuit Court of Mobile, approved February 28th, 1870, which is still of force in this particular, an exe-

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cution is returnable on the first Monday in the month next after the expiration of five months from the day it is issued.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. H. T. TOULMIN.

E. S. DARGAN, for the appellants.

JOHN T. TAYLOR, and C. H. LINDSAY, *contra*.

MANNING, J.—This was a motion in the Circuit Court of Mobile, on behalf of appellees, against Shelton, sheriff of that county, and his sureties, for his failure to return a writ of execution upon a judgment of said court in plaintiffs' favor. They obtained a judgment in this proceeding, for the statutory penalty of twenty *per cent.* of the amount of the execution. This writ was issued and delivered to him on the 11th of April, 1878; and in the body of it he was commanded to make return of it, and of the execution of it, "according to law, to-wit, on the first Monday of October, 1878."

The judgment on the motion was rendered in June in that year, during a term of the court which began on the 29th day of the same month (April) in which the writ was issued, and only eighteen days afterwards. The term was made to commence at that time, by a recent act of the legislature, which was carried into the Code of 1876-7; the terms of the court previously beginning on the first Monday in March, and the third Monday in November, in each year, according to "an act to regulate the practice in the Circuit Court of Mobile county," approved February 28th, 1870.

The judgment appealed from was founded on the following sections, numbered 3190 (2852), and 3191 (2853), in the Code of 1876-7. The sheriff "must execute the writ with diligence, and, if practicable, perform the mandate thereof, and make return of his acts to the clerk, three days before the first day of the return term of the writ." "The return term of the writ is the term next after its date, unless issued less than fifteen days before court; in which case, it is the term next thereafter."

These provisions of law have been on our statute-books very many years. They are found, in the exact form quoted, in the Codes of 1852 and 1867; and the continuance of them in the Code of 1876-7 does not give to them any greater effect, or more extended operation, than they had prior to and at the time of its adoption. Then, and before, these sections, or the portions of them affecting this case, had been

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limited and superseded, so far as the Circuit Court of the county of Mobile was concerned, by the second section of the statute above mentioned, of February 28th, 1870; which enacted in respect of that court, that all executions and final process shall be made returnable on the first Monday of the month, whether in term time or not, next after the expiration of five months from the date of the issuance thereof."

The writ of execution, for the failure to return which this judgment was obtained, was issued in accordance with that provision, and made returnable the first Monday in the month next after the expiration of five months from the day it was issued. The precept of the writ—the command to make the money—had not lost its force, nor had the time lapsed which was allowed to the sheriff within which he was to perform this service. The part of the local statute not inconsistent with the subsequent enactment changing the time of holding the Circuit Court of Mobile was not thereby repealed.—Code, § 10. The Circuit Court erred in supposing that it was; and its judgment on this motion of appellees must be reversed.

Let the cause be remanded, that the motion may be overruled, or dismissed, in the Circuit Court.

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Action on Replevin Bond in Attachment Case.

1. *Replevin bond; to whom payable, and who may sue on.*—A replevin bond, in an attachment case, should be made payable to the plaintiff in attachment (Code, § 3289), and not to the officer by whom the writ is levied; and if made payable to the officer, the plaintiff can not maintain an action on it in his own name.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. W. L. WHITLOCK.

This action was brought by N. B. Leath, against George Agnew; was commenced on the 9th August, 1873, and was founded on a replevin bond, signed by said Agnew as surety for William Johns, in an attachment suit instituted against him by said Leath, the plaintiff in this suit. There was a demurrer to the complaint, and a memorandum by the clerk states that it was overruled; but the judgment-entry only sets out a verdict and judgment for the plaintiff on issue joined, and does not notice the demurrer. The pleadings

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were complicated, and numerous exceptions were reserved to the rulings of the court during the trial. The overruling of the demurrer to the complaint, the final judgment, and the several rulings to which exceptions were reserved, but which require no notice, are now assigned as error.

D. CLOPTON, with M. J. TURNLEY & SON, for the appellant, cited *Sprowl v. Lawrence*, 33 Ala. 674, as showing that the action could not be maintained.

WATTS & SONS, *contra*.—Since the overruling of the demurrer is not shown by the judgment-entry, this court will not notice it, but will presume that it was waived.—*Carlisle v. Davis*, 7 Ala. 42; *Crosby v. Lassiter*, 4 Ala. 201; *Petty v. Dill*, 53 Ala. 641. The demurrer being out of the way, no question can be raised as to the plaintiff's right to maintain the suit.—*Phillips v. Sellers*, 42 Ala. 658; *Harris v. Plant & Co.*, 31 Ala. 639.

STONE, J.—Leath sued out an attachment against Johns, returnable before a justice of the peace. It was levied on personal chattels, by Hamilton, as constable. Johns replevied the property, giving Agnew as his surety. The replevin bond should have been made payable to Leath, plaintiff in attachment, but was made payable to Hamilton, the constable.—Code of 1876, §§ 3683, 3289, 3689. This, then, is not a statutory bond, on which statutory proceedings can be maintained. It is, at most, only a common-law obligation, or bond, on which a common-law action can be prosecuted. The bond, not being for the payment of money, must be sued in the name of the person having the legal title. It does not fall within the influence of section 2890 of the Code, which allows suits to be prosecuted in the name of the party really interested, whether he has the legal title or not. That section is confined to actions on contracts, express or implied, for the payment of money. Leath can not maintain the present suit, in his own name.—*Sprowl v. Lawrence*, 33 Ala. 674, 684. The complaint, on its face, shows this state of facts, and the demurrer to it ought to have been sustained.

Many questions are raised by the record, but it is not likely they will come up again in their present form.

Reversed and remanded.

Barnett v. Riser's Executors.]

Barnett v. Riser's Executors.*Bill in Equity to Enforce Vendor's Lien on Land.*

1. *Vendor's lien; transfer of note for purchase-money.*—A vendor's equitable lien on land, for the unpaid purchase-money, does not pass to an assignee or transferee of the note given for the purchase-money, when the transfer does not involve the vendor in liability for the ultimate payment of the note, but secures to him all the benefits of a payment.

1. *Same; what objections avail on error.*—A decree enforcing a vendor's equitable lien on land, in favor of an assignee or transferee of the notes for the purchase-money, will not be reversed on error, because the record does not affirmatively show that the lien passed to him by the transfer of the note, when that question was not raised in the court below.

APPEAL from the Chancery Court of Talladega.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 23d December, 1875, by John W. Heacock and D. B. Riser, as executors of the last will and testament of George Riser, deceased, against William E. Barnett; and sought to enforce a vendor's equitable lien for the unpaid purchase-money of a tract of land, of which said Barnett was in possession, and which he had bought from one James S. Bowdon, giving his three notes for the purchase-money, each for \$100, dated the 25th October, 1872, and payable on or before the 25th November, 1873. The bill alleged that, "on or about the 23d October, 1873, complainants' testator purchased from James S. Bowdon three promissory notes," particularly describing them, and stating their consideration; that Bowdon conveyed the land to Barnett, and placed him in possession; "that a lien in favor of said Bowdon, to secure the payment of said notes, attached to said land by virtue of the sale of said land by him to said Barnett"; that "this was an equitable lien, and accompanied the said notes, and complainants' testator, when he purchased said notes from said James Bowdon, became invested with said lien, as part of his purchase; and these complainants are now the owners of said notes, which have never been paid, in whole or in part, and of the said equitable lien on said land to secure the payment of them; and they aver that they are entitled to have their said lien enforced in this court." The defendant answered, admitting the sale and conveyance of the land, his possession thereof, and the execution of his notes for the purchase; denying the

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complainants' ownership of the notes, and the averment that they had not been paid; alleging, on the contrary, that they were fully paid and discharged to the said George Riser in his life-time; and as to the averments above copied, in reference to the purchase of the notes and the asserted lien, he answered, "that said averments state conclusions of law, and he can neither admit nor deny such averments." The chancellor submitted the issue of payment *vel non* to a jury; and they having found the issue in favor of the complainants, he approved the verdict, and rendered a decree for the complainants, for the amount due on the notes, ordering a sale of the lands by the register unless the amount was paid in twenty days. From this decree the defendant appeals, and assigns as error that neither the bill nor the evidence shows that the complainants had a lien on the lands.

GEO. W. PARSONS, for the appellant, cited *Hightower v. Rigsby*, 56 Ala. 126; *Bankhead v. Owen*, 60 Ala. 457; *Hall v. Click*, 5 Ala. 363; *Flewellen v. Crane*, at the last term.

TAUL BRADFORD, *contra*.—No question was raised in the court below as to the sufficiency of the bill, or as to the transfer of the notes; and none can be raised in this court for the first time. That the vendor's lien passes by an assignment of the purchaser's notes, see *Roper v. McCook*, 7 Ala. 318; *Magruder v. Campbell*, 40 Ala. 611; *White v. Stoner*, 10 Ala. 441; *Day v. Preskett*, 40 Ala. 624.

BRICKELL, C. J.—In *Hightower v. Rigsby*, 56 Ala. 126, and in *Bankhead v. Owen*, 60 Ala. 457, it was decided, after much consideration of the question, that the equitable lien of a vendor of lands, for the payment of the purchase-money, did not pass by a transfer of the note, which did not involve the vendor in liability for its ultimate payment, and which, in effect, operated, so far as he was concerned, and secured to him all the benefits of a payment. The bills, in those cases, affirmatively disclosed that such was the character of the transfer of the notes; and its operation to pass the lien was a question raised and decided in the Court of Chancery. In this case, it does not affirmatively appear that such was the character of the transfer, nor does it appear that, in the Court of Chancery, the sufficiency of the transfer to pass the lien was controverted.

It is a very general rule in appellate courts, which this court has observed very closely, that questions not made and decided in the primary courts, will not avail on error to reverse a judgment or decree, unless it be a want of jurisdic-

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tion apparent on the face of the proceedings.—1 Brick. Dig. § 31, 776. The rule is conservative, and essential to prevent parties from being surprised by objections which, if it was not intended to waive, ought to have been made in the course of the proceedings, and before judgment or decree in the primary court; and which, if there made, would often be obviated. This bill avers that the complainant had purchased the notes of the vendor. The averment may be objectionable, for generality; but that objection was not made in the court below. If it had been, and the objection now made, that the transfer of the notes was without recourse on the vendor, we cannot say that, by an amendment disclosing the character of the transfer, the objections would not have been removed. Judgments or decrees are of too much value, and of too great dignity, to be reversed on error for objections of this kind, not made in the primary courts, and which parties not making must be presumed to waive.

Affirmed.

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Application for Prohibition.

1. *When prohibition lies.*—A writ of prohibition lies, not for the correction of errors in the exercise of a rightful jurisdiction by a court, but to prevent usurpation, or the exercise of powers beyond and outside of its lawful jurisdiction; and it is only awarded when there is no other appropriate and adequate remedy.

2. *Removal of cause into Federal court*—When application is made for the removal of a cause from a State court into a Federal court, under the acts of Congress regulating the removal of causes, the jurisdiction of the former court does not cease on the filing of a petition and bond in proper form: the court must examine the petition, in connection with the cause to which it relates, and determine for itself whether a sufficient cause of removal is shown; and until it determines that sufficient cause is shown, its jurisdiction over the cause is not terminated.

3. *Same; remedy when refused.*—When the removal of a cause into the Federal court is sought, and is improperly refused by the State court in which the cause is pending, the party has an adequate remedy under the act of Congress of March 3, 1875, and is not entitled to a writ of prohibition, or other extraordinary writ from this court.

Application by petition, verified by affidavit, for a writ of prohibition, or other appropriate remedial writ, to the Circuit Court of Mobile, Hon. H. T. TOULMIN presiding, to restrain any further proceedings in a certain cause or suit, therein

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lately instituted by the American Union Telegraph Company, a corporation chartered under the laws of Louisiana, to procure by the judgment of the court an easement for the erection of its poles and wires over and along the line of the Mobile and Ohio Railroad; to which cause or proceeding the said railroad company was made a defendant, and which it sought to remove into the Circuit Court of the United States, by petition under the acts of Congress. The proceeding by the telegraph company was instituted on the 31st May, 1880, and was set for hearing on the 14th June next. The petition of the railroad company, for the removal of the cause into the Circuit Court of the United States, was filed on the 12th June, and was accompanied with a bond conditioned as prescribed by the act of Congress. The telegraph company filed written objections to the removal of the proceeding, on the ground that it was not such a cause as was subject to removal. The court sustained that objection, and refused to order the removal as prayed; and the railroad company thereupon filed its petition in this court, to restrain any further proceedings in the cause by that court. On the filing of the petition in this court, a rule *nisi* was awarded; and answers thereto being filed by the presiding judge of the court, and also by the telegraph company, admitting the facts as stated, but denying the right to remove the proceedings, the case was submitted to this court for decision.

G. B. CLARK, and E. L. RUSSELL, for the petitioner, cited *Boom Company v. Patterson*, 8 Otto, 403; *Kolk v. United States*, 1 Otto, 375; *Gaines v. Fuentes*, 2 Otto, 10; 13 Wallace, 270; 20 Wallace, 445; 16 Peters, 97.

H. PILLANS, for the respondent, cited *Mills on Eminent Domain*, §§ 10, 11, 84, 85, 87; 1 Redf. Railways, 229; 6 Howard, 536; 16 Cal. 248; 8 Wendell, 85; 21 Wallace, 196; 2 Sumner, 345; 2 Otto, 21; 116 Mass. 125; 6 Wallace, 139; 18 Howard, 470; 45 Ind. 133; 9 Sm. & Mar. 623; 1 La. Ann. 696; 36 Barbour, 341; 11 Wisc. 51; *Ex parte Grimball*, 61 Ala. 403; High on Extra. Leg. Remedies, 771-2.

BRICKELL, C. J.—This is an application for a writ of prohibition, or other remedial writ, directed to the judge of the Circuit Court of Mobile county, commanding him to desist from further proceedings in a cause, which the petitioner had, under the act of Congress of March 3, 1875, taken the necessary steps to remove into the Circuit Court of the United States. The proposition of the relator—that which must be maintained, to authorize the issue of a writ

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of prohibition—is, that having filed a petition, in proper form, accompanied with a bond conforming to the act of Congress, the sufficiency of which is not questioned, “the *rightful* jurisdiction of the Circuit Court ceased, *eo instanti*,” and the court was bound to abstain from all further proceeding, and from all inquiry whether the cause was of the class which may be removed from a State to a Federal court.

A writ of prohibition will not lie, when a court has jurisdiction, and errs in its exercise. The writ lies, not for the correction of errors, but for the prevention of usurpation. “The object of prohibitions, in general, is,” it is said in Bacon’s Abridgment, “the preservation of the right of the king’s crown and courts, and the ease and quiet of the subject. For it is the wisdom and policy of the law to suppose both best preserved when everything runs in its right channel, according to the original jurisdiction of every court; for, by the same reason that one court might be allowed to encroach, another might; which could produce nothing but confusion and disorder in the administration of justice.”—8 Bacon’s Abr. 209. A party must be drawn *ad alium examen*, by a jurisdiction, or manner of process, disallowed by the laws of the land; or when, in handling matters clearly within their cognizance, the inferior courts transgress the grounds prescribed to them by the law.—2 Brick. Dig. 389, §§ 5-6.

Whether a State court has any power to refuse the removal of a cause under the act of March 3, 1875; whether it can pass upon the right, and whether any order of removal is necessary, or whether it is essential that the fact of removal should be entered on its record, are questions about which there is a conflict of opinion, and of decision. It is, doubtless, more in accordance with the regularity and propriety of judicial proceedings, that the fact of removal should be entered on the records of the court, that the disposition of the cause should be made apparent. It is no part of my province or duty now to consider or discuss these questions. In *Ex parte Grimbail*, 61 Ala. 598 (in which I was not competent to sit), this court decided, that the jurisdiction of the State court is not terminated by the filing of the petition and bond for removal—that for itself the court must examine the petition, in connection with the cause to which it relates, and determine whether the right of removal exists. Until it is determined that the right exists, and that the petition and bond are in proper form, the jurisdiction of the court continues. Without expressing dissent from, or concurrence in this conclusion, it is now the law of this court; and it follows that the Circuit Court was in the line of its jurisdiction, when it determined there was not a right to remove the cause

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shown by the petitioner. That determination, if erroneous, must be revised by an appropriate remedy for the correction of errors.—High's Ex. Leg. Rem. § 771.

Again, a writ of prohibition can be awarded, only when there is no other appropriate and adequate remedy.—*Ex parte Greene & Graham*, 29 Ala. 52. Whatever may have been the conflict of opinion, and of decision, as to the power of Federal courts, under former acts of Congress, to resort to any compulsory process for removing causes from the State courts, is put at rest by the act of March 3, 1875. Express power is given to the Circuit Court of the United States to issue a writ of *certiorari* to the State court, commanding a return of the record. The refusal of the ministerial officer of the State Court to furnish the party seeking a removal a copy of the record, on tender of the legal fees, is a misdemeanor. The act, of itself, furnishes the party seeking removal with adequate remedies to make it effectual, if the Federal court shall be of the opinion that the right to remove exists. It is far better that these remedies, given by the statute creating the right claimed, should be pursued, than that extraordinary remedies, intended only to prevent a failure of justice, should be allowed. For the same reasons, a *mandamus* ought not to be awarded.—High's Ex. Leg. Rem. § 584.

We do not enter on the consideration of any other questions which are, or may be supposed to be, involved. The rule *nisi*, heretofore awarded, must be vacated, and the petition dismissed.

Mayor and Aldermen of Birmingham v. Rumsey & Co.

Action against Municipal Corporation, on Common Counts.

1. *Exception to charges to jury.*—A recital in the bill of exceptions that the defendant "duly excepted to charges numbered 1, 2, and 4," does not show a separate exception to each charge, but is a general exception to them all, and can not avail unless each of them is erroneous.

2. *Municipal corporation; power to purchase fire-engine.*—The power to purchase a fire-engine, or other appliances for extinguishing fires, reasonably commensurate with the wants of the city, to be judged by the corporate authorities, is a necessary police function, and is inherent in every city government, as one of its incidental powers, unless expressly taken away.

3. *Same; execution on judgment against.*—When judgment is rendered against a municipal corporation, execution may be ordered to issue against it, as

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against a private person; and under such execution, though property used for public purposes cannot be seized, such as hospitals, markets, cemeteries, &c., private property belonging to the corporation, and not useful or used for corporate purposes, may be seized and sold.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. WM. S. MUDD.

This action was brought by Rumsey & Co., against the mayor and aldermen of the city of Birmingham, to recover the sum of \$1649.75, the agreed price of a fire-engine, hose carriage, &c., sold and delivered by plaintiffs to defendants in August, 1872; and was commenced on the 12th August, 1875. The complaint contained only the common counts. No pleas appear in the record. There was no controversy as to the sale and delivery of the engine, the price, or any of the other terms of the contract; and the only dispute grew out of the conduct of an attorney, to whom plaintiffs had remitted their claim for collection. It appeared that plaintiffs had sent their claim, for collection, to Hargrove, Lewis & Younge, attorneys-at-law; and said Younge, "without the authority or knowledge of plaintiffs, settled said claim or account with defendant, and took from said defendant, in payment of said claim or account, several drafts, or warrants of the city, drawn by the city clerk, on the treasurer, payable to the order of the plaintiffs," there being no money in the city treasury at the time. On one of these drafts, or warrants, the sum of \$75 was paid to said Younge by the city treasurer, for which a credit was entered on it; the others were transferred by him to third persons, and appropriated by him to his own private use; and some of them had been received by the city in payment of taxes, from the persons to whom they had been transferred. Younge had absconded, and the plaintiffs had received no money in part payment of their debt.

On these facts, and others stated in the bill of exceptions, the court gave the following charges to the jury, which were in writing:

"1. That if the jury shall believe from the evidence that, in the month of August, 1872, the mayor and aldermen of the city of Birmingham ordered from the plaintiffs a fire-engine, two hose-carriages, hose and attachments, &c., for the value of which this suit is brought, for the use of fire-companies then organized in said city, and proposed to pay a stipulated price for the same; a part of said price to be paid in cash, and the balance to be paid at a future specified period; and if said jury shall further believe that the terms of said mayor and aldermen were accepted and agreed to by plaintiffs, and that said plaintiffs shipped said articles so

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ordered to the said mayor and aldermen at Birmingham, and that they were in due time received by said mayor and aldermen, and by them turned over to said fire companies; and if said jury shall also believe from the evidence that, after said articles were received by said mayor and aldermen, to-wit, on the 9th day of April, 1873, the mayor and aldermen of said city of Birmingham held a meeting of their board, and at said meeting, by a resolution of said board, at that time adopted, and entered on the minutes of said board, it was ordered that the account or claim of said plaintiffs, for said articles so ordered by said mayor and aldermen, and by them received as aforesaid, be allowed and paid, said property being then in the ownership and possession, and under control of defendants,—that these facts, if proven, would create a liability on the part of said defendants to pay said plaintiffs for said articles.

"2. That if the jury shall believe, from the evidence, that the account or claim sued for in this action was sent by plaintiffs to Hargrove, Lewis & Younge, a firm of attorneys-at-law, to be by them collected for said plaintiffs; and that said Younge, one of said firm, received said account or claim, so sent by said plaintiffs to said attorneys for collection; and that said Younge, without the knowledge or authority of plaintiffs, settled said account or claim with said defendants, and took from said defendants, in payment of said account or claim of said plaintiffs, several drafts or warrants, drawn by the clerk of said city of Birmingham, on the treasurer of said city, payable to the order of plaintiffs; and there was at the time no money in the treasury of said city to pay said drafts or warrants; and that the same were not paid to said attorneys of plaintiffs in money, by the treasurer of said city, or by any other person, by authority of, or for the use and benefit of said defendants,—that then there was no legal payment of said account or claim, as against the said plaintiffs, that would discharge said defendants.

"4. That if the jury shall believe, from the evidence, that the account or claim sued for was sent by plaintiffs to said firm of Hargrove, Lewis & Younge, as attorneys-at-law, to be by them collected for said plaintiffs; and that said Younge, one of said firm, received said account or claim, and, in settling the same with defendants, received drafts or warrants drawn by the clerk of the city of Birmingham, on the treasurer of said city, payable to the order of said plaintiffs; and that said Younge, without the knowledge or authority of said plaintiffs, indorsed some of said drafts or warrants to third parties, in the name of said plaintiffs, in payment of debts which said Younge was owing to said par-

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ties; and that said Younge, without authority or knowledge of plaintiffs, sold and transferred, without any indorsement, some of said drafts or warrants to third parties, and received money from said parties, in part or in whole, for said drafts or warrants; and that said parties, to whom said Younge indorsed, sold and transferred said drafts or warrants, received payment of the same from said defendants, in settlement of their taxes, or other dues owing by them to said city of Birmingham,—that this would not amount to a legal and valid payment of said account or claim, as against the plaintiffs in this suit, nor discharge the defendants from their liability to pay the same.”

The bill of exceptions says, “the defendant then and there duly excepted to charges Nos. 1, 2, and 4;” and these charges are now assigned as error, together with that part of the judgment which orders execution to issue as on ordinary judgments.

WATTS & SONS, and D. S. TROY, for appellants.

TERRY & LANE, *contra*.

STONE, J.—In the court below there was a general exception to the three charges, numbered 1, 2, and 4. Under a uniform rule, this exception can not avail, unless each of the charges is tainted with error. We are not prepared to say there is error in either of them. The first is clearly free from error. It asserts, that the corporate authorities of the city of Birmingham had power as such to purchase a fire-engine, hose-carriages and attachments, and thereby fasten a legal charge or liability on the city. It is contended for appellant, that, at the time this contract was entered into, the corporate authorities were without power in the premises. Birmingham was incorporated as a city, having apparently large dimensions, by act approved December 19, 1871. Pamph. Acts, 229. That statute conferred the power “to make all by-laws and ordinances, of whatever kind, and upon whatever subject to them may seem right and proper for the good government of said city.” A second statute, approved February 26, 1872 (Pamph. Acts, 233), after empowering the city government to establish gas-works and water-works for the city, or, by contract, to have the city supplied with gas and water, contains this general clause: “and to do every matter and thing which they may deem necessary for the good order and welfare of said city.” Good government, and good order and welfare of a city, imply much more than mere preservation of social order. Sanitary regulations,

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and appliances for extinguishing fires, to an extent reasonably commensurate with the city's wants, to be judged of by the corporate authorities, are certainly within the purview of good city government. We do not wish to be understood as affirming that any specific grant of power is necessary to the performance of this very necessary police function. We hold it is inherent in every city government, as one of its incidental powers, unless taken away by statute.—1 Dillon, Mun. Corp. § 94; *Robinson v. City of St. Louis*, 28 Mo. 488.

3. It is also assigned as error, and here urged as ground of reversal, that the Circuit Court, after rendering judgment against the city, ordered execution to issue for its collection. We do not hesitate to declare, that city property, owned or used by the corporation for public purposes, such as public buildings, public markets, hospitals, cemeteries, engine-houses, fire-engines and their apparatus, and other property, real or personal, of kindred utility, can not be taken in execution for debts of the city. But, if the city owns private property, not useful or used for corporate purposes, such property may be seized and sold under final process, precisely as similar property of individuals is seized and sold. 2 Dillon, Mun. Corp. § 446. If there be none, or an insufficient amount of such property to satisfy the debts of the corporation in judgment, then the creditor's coercive remedy is *mandamus*, to compel a levy, assessment, and collection of a tax, to pay the judgment.—2 Dillon, Mun. Corp. § 685; Herman on Executions, § 364. The Circuit Court did not err, in ordering execution to issue on the judgment rendered in this case. Should the process be abused by a levy on property of the corporation used for public purposes, the law affords the city ample means for arresting such unauthorized use of the execution.

The judgment is affirmed.

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Bill in Equity for Contribution to Party-Wall.

1. *Party-wall; contribution between adjacent proprietors.*—When a party-wall separating the buildings of adjacent proprietors, and erected by them at their joint expense, is destroyed by fire, there is no implied agreement between them, nor is there any legal obligation, to rebuild another wall in like manner on the same foundation; and if one rebuilds on the same foundation, he can not compel a purchaser from the other proprietor to contribute to the cost of

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the wall, or to make compensation for using it in the subsequent erection of a building on the other lot.

2. *Same; custom, or usage.* — "The custom and practice of lot-owners in the city of Mobile," as to contribution or compensation between the owners of adjacent lots for the cost of a party-wall between them, can not be received to affect their legal rights; and if such custom or usage were valid, it is not sufficiently pleaded by an averment that it has been "constantly and uniformly recognized and abided by in said city in similar cases."

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. H. AUSTILL.

The bill in this case was filed on the 30th August, 1877, by Antonio Philippe, as the executor of the last will and testament of Charles P. Antomarchi, deceased, against Thomas S. Russell; and sought to recover from the defendant contribution for the cost of erecting a party-wall between two adjacent lots and houses, owned by the complainant and defendant respectively, or compensation for the use by the defendant, in the erection of his house, of the wall which had been already erected by the complainant. The material facts of the case were thus stated in the opinion of the court, as delivered by MANNING, J.:

"The complainant alleged in his bill that his testator, Antomarchi, and one Joseph Aaron, were severally the owners of two adjoining lots on Dauphin street, in Mobile, on which were two contiguous brick stores; that the middle line of the partition wall between these stores was the boundary between the two properties; and that this wall 'was a wall common to both, and used as a common wall, and had been for a great number of years' before Aaron bought his lot, which he purchased in April, 1860. The bill further alleged that, in December, 1873, after the death of Antomarchi, and while complainant, as his testamentary executor and trustee, was in possession of the lot and store so conveyed to him, both of said stores were accidentally burned down, and the wall between them was destroyed to its foundations, which, however, remained sound and firm; that complainant, as such executor and trustee, caused a store to be rebuilt on the premises of which he was so in possession, erecting the western wall thereof on the foundations of the former wall, so that one-half of the new wall, as of the old, was on the lot conveyed to Antomarchi, and the other half on that of Aaron, upon and along the east side of the latter; that Aaron did not rebuild upon his lot, but left the same vacant, and sold it, in that condition, to defendant, Russell, in the year 1876; and that Russell thereafter built a store upon it, using in doing so, as the eastern wall and side of said store, the wall so constructed by complainant, and carrying it up higher, as was necessary for the latter edifice he erected. There is

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no averment of any agreement with either Aaron or Russell in respect of this wall, or that either of them knew complainant was building it when he did so. The bill further alleges, that the cost of the wall built by complainant was \$1,125, which sum he paid therefor, and one-half of which is due to him from said Russell, who has refused to pay the same, or any part thereof, although it was demanded of him on the completion of the store he built in December, 1876, and 'is lawfully due . . . according to the usage and practice of lot-owners, . . . constantly and uniformly recognized and abided by in said city in similar cases.'

"The answer insists, and testimony was taken to prove, that the entire wall was built on Aaron's lot, now Russell's. But it is not necessary to examine the case in that direction.

"The chancellor dismissed the bill, on demurrer, because the complainant's remedy, if he had any, was at law; and this decree is now assigned as error."

STEWART & PILLANS, for the appellant, cited *Campbell v. Mesier*, 4 John. Ch. 334; 6 John. Ch. 21; 3 Kent's Com. 437 (531); *Brown v. Werner*, 40 Maryland, 15; 3 Eng. Rep. (Moakes' ed.) 294; 7 *Ib.* 577.

BOYLES & OVERALL, *contra*, cited *Sherrod v. Cisco*, 4 Sandf. 489; *Cole v. Hughes*, 54 N. Y. 444; *Partridge v. Gilbert*, 57 N. Y. 209; *S. C.*, 3 Duer, 185; 49 How. Pr. 522; 119 Mass. 254; 5 Florida, 385; 3 Washburn on Real Property, 160; 2 *Ib.* 363; *Brown v. Cockrell*, 33 Ala. 45; *Barnes v. Ingalls*, 39 Ala. 193; *Barlow v. Lambert*, 28 Ala. 704.

MANNING, J. [After stating the facts as above.]—There is no statute in this State on the subject of what are called party-walls. In *Bisquay v. Jeunelot* (10 Ala. 245), a question was brought before this court similar to the one now raised. Jeunelot built a house on his own land, up to the boundary line, we suppose; and the owner of an adjoining lot then also built a house, using for one side of it the wall of Jeunelot. The latter sued the other in assumpsit, for a just proportion of the cost of the wall, and in the court below obtained a verdict and judgment; but the judgment was here reversed. This court said: "The argument here urged is, that, although there is no express contract to pay the proper proportion of the cost of the wall, the law creates a duty to contribute when the wall is used, and from the duty the law will imply a promise to pay. The error of this argument is in the assumption, that the law creates the duty of contribution, when one man, without the consent of the owner, uses

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his wall in the construction of his own house. Such an act, in the absence of a law authorizing it, would be a trespass, which might entitle the party injured to damages, but could not be the foundation of an action *ex contractu*." And for this very reason, we add, it would afford no foundation for a suit in equity; a court of chancery not being the proper forum, in which to claim damages for injuries caused by torts.

But, the case referred to differs from the one before us, in this: that, according to the bill of complaint, Russell used in building his store a wall that, so far as he appropriated it, was erected, not on complainant's, but on Russell's own land, excepting one-half of that portion which was built up higher, and which does not enter into this case. The wall was there when he bought the lot. He had a right to suppose that any thing then erected on the lot was duly paid for by the prior owner; and the wall may have constituted a part of the value which induced him to buy the lot. Indeed, he may have, as was said in *Sherrod v. Cisco* (4 Sandf. 489), "so far as we know, paid for it all that it was worth, including the half-wall then standing upon it; and a judgment in this suit, compelling him to pay the plaintiff for the same half, will make him pay for it twice."

The case just cited does not differ substantially from the one we are considering, and was very thoroughly and ably discussed. In it the court said: "By the common law, every owner of land is his own judge of the propriety of building upon it, or leaving it vacant; and when he does build, of the manner and extent of his buildings. In the absence of statutory provisions, he may build with what material he pleases; and he is under no obligation to give to his neighbor any use or advantage of his land, by way of support, drip, or easement of any description. If a stranger dispossess him, or enter upon his unoccupied property, erect buildings, and make valuable permanent improvements upon it, he is not under the slightest obligation to recompense such stranger for any portion of the expense, on recovering the possession of the land." By the common law, he became absolutely entitled to all such improvements, without paying any thing for them, when they were made without his request or sanction.

In respect of another feature, common to this case and the case just cited, the court in the latter said: "It was argued, that the fact of there having formerly been a partition wall (which we will call a party-wall), gives the right to have it continued for all time to come. To test this argument fairly, we will assume, what is not proved, but may,

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perhaps, be fairly inferred—that the old wall was built by the mutual agreement, and at the joint expense, of the then proprietors of the two lots. It is not disputed that each proprietor remained the owner in severalty of the ground on which half of the wall rested, and, of course, each owned in severalty one-half of the wall. Neither party had a right to pull down the wall, without the other's consent; and to that extent, the agreement on which it was erected controlled the exclusive dominion which each would otherwise have had over the half of the wall, as well as over the soil on which it stood. The case of *Campbell v. Mesier* (4 John. Ch. R. 334; 6 *Ib.* 21), it may be said, is an authority that each was bound to keep the wall good on its falling into decay; but that case proceeded upon the footing that each had an equal interest in the party-wall, of the same nature as that of tenants in common; and the fact here is clearly otherwise. The parties being confessedly restrained from destroying the wall without mutual consent, how is it when the wall has been destroyed by the elements? The lands on each side are vacant. The agreement upon which the party-wall was built, related to that wall only. There was no agreement to build a second wall, or to build houses a second time, in the event that the original wall, and the houses which it supported, should be destroyed. Neither party, perhaps, thought of such event. If they had, it by no means follows that they would at that time have stipulated for a second joint wall. It might well have occurred to them, that, if the buildings were destroyed, one or the other might not wish to rebuild, or that one might desire to erect a very strong warehouse for heavy goods, requiring thick walls, and the other a private dwelling, with a wall only half as thick.

It suffices to say, that when two owners of adjoining city lots unite in building two stores with a party-wall, we have no right to infer, from that act, an agreement, binding upon them and their heirs and assigns to the end of time, to erect another like party-wall at their mutual expense, when that one is casually destroyed, and so on as often as the new one shares the same fate.”—See, also, *Cole v. Hughes*, 54 New York, 444.

We have extracted so largely from the case of *Sherrod v. Cisco*, because that case is almost identical with this, and the questions arising upon it are so clearly and cogently discussed. Similar views, forcibly presented, may be found in *List v. Hornbrook* (2 West Va. 340), and in *Orman v. Day* (5 Florida, 385); and the subject of party-walls is instructively treated at considerable length, and with the citation of num-

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erous authorities, in Washburne on Easements and Servitudes, 454-474.

The case of *Campbell v. Mesier* (4 John. Ch. R. 334), on which appellant chiefly relies, is different in its facts and features from the present case, and therefore not an authority in point.—See *Partridge v. Gilbert*, 15 N. Y. 601.

In respect to the averment that the sum claimed is due according to "the usage and practice of lot owners," in the city of Mobile, if it were permissible thereby, as it certainly is not, to abrogate or amend the law concerning the rights of owners of real estate in their property, such usage and practice are not so pleaded as to be effectual to that end. On the subject of usage or custom, see *Barlow v. Lambert*, 28 Ala. 704.

Let the decree of the chancellor be affirmed.

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Action on Sheriff's Official Bond.

1. *Statute of limitations to amended complaint.*—Where the original complaint is founded on a sheriff's official bond, and assigns as a breach the non-payment of a decree rendered against him as administrator by virtue of his office; and an additional count is filed, by leave of the court, as an amendment to the complaint, which counts on the probate decree only, and makes no reference to the bond; the amendment does not present new matter, to which the statute of limitations can be pleaded.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN K. HENRY.

This action was brought by Louisa Stringer, against Philemon B. Waters, and was commenced on the 7th April, 1877. The original complaint contained only a single count, as follows: "The plaintiff claims of the defendant five hundred dollars, as a penalty for the non-performance of the condition of a bond executed by the said P. B. Waters, as sheriff of Butler county, Alabama, on the 14th day of August, 1855, in the penal sum of twenty thousand dollars, with Edward Bowen and John Bolling as sureties on his said bond. The condition of said bond was, that the said P. B. Waters should faithfully discharge the duties of said office; which said bond was approved by the probate judge of said county, and recorded according to law. Plaintiff avers that, while acting as sheriff under and by virtue of his said bond,

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the said P. B. Waters was appointed *ex officio* administrator of the estate of William Sims, deceased; that he accepted said appointment, and acted as such administrator; that on a final settlement of said estate by the said P. B. Waters, to-wit, on the 20th day of April, 1859, a decree was rendered against him, in favor of the plaintiff and her husband, Alexander Stringer, who has since died; and that said decree was in favor of the plaintiff, as one of the legatees of said estate, for five hundred dollars; which said decree is still due and unpaid, and the property of the plaintiff. Plaintiff further avers, that said Edward Bowen and John Bolling, sureties on defendant's said bond, are both now dead; and that by reason of the failure, on the part of said P. B. Waters, to pay said decree, he has become liable to pay the same as a penalty for a breach of the conditions of his said bond; for which the plaintiff brings this suit, together with the interest thereon."

To this complaint the defendant pleaded—1st, not indebted; 2d, performance of the condition of said bond; 3d, payment and satisfaction of the probate decree; 4th, the statute of limitations of ten years. By leave of the court, the plaintiff added to her complaint, on the 12th July, 1879, a new count, as follows: "The plaintiff claims of the defendant the further sum of five hundred dollars, due on a decree rendered in the Probate Court of Butler county, on the 20th day of April, 1859, against the defendant, on his final settlement as the administrator of the estate of William Sims, deceased, in favor of the plaintiff and her husband, Alexander Stringer, who is now dead, together with the interest thereon." To this count the defendant pleaded "the same pleas as to the original complaint, and the further plea of the statute of limitations of twenty years;" and issue seems to have been joined on all these pleas. On the trial, as the bill of exceptions shows, the plaintiff read in evidence the defendant's official bond as sheriff, the probate decree described in the complaint, the will of William Sims containing the legacy to the plaintiff, and her own deposition as to the death of her husband, the non-payment of the decree, &c. This being all the evidence, the court charged the jury, if they believed the evidence, they must find for the defendant. This charge, to which the plaintiff excepted, is the only matter assigned as error.

J. M. WHITEHEAD, for the appellant, contended that the amended complaint did not set up a new cause of action, and that the statute of limitations did not bar the suit.

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STONE, J.—The present record presents but a single inquiry: Did the statute of limitations run, as to the matter set up in the amended complaint, until that amendment was made? In *King v. Avery*, 37 Ala. 169, we stated the rule as settled, "that if, during the pendency of a suit, any new matter or claim, not before asserted, is set up and relied upon by the complainant, the defendant has the right to insist on the benefit of the statute, until the time that the new claim is presented; because, until that time, there was no *lis pendens*, as to that matter, between the parties. On the contrary, if the amendment set up no new matter or claim, but simply vary the allegations as to a subject already in issue, then the statute will run only to the filing of the original bill."—See, also, *Bradford v. Edwards*, 32 Ala. 628. We do not understand *Lansford v. Scott*, 51 Ala. 557, as intending to overturn or weaken this principle. We think this rule sound, and will adhere to it.

The original complaint, in the present case, counts on the bond of Waters given as sheriff, he having been appointed administrator of Sims by virtue of his office. In April, 1859, Waters came to a settlement of his administration, and a decree was rendered against him, in favor of Louisa Stringer, a legatee under the will of Mr. Sims. The original complaint describes that decree, and the breach alleged is its non-payment. The amended complaint makes no reference to the bond, but counts on the probate decree. Like the original count, the breach it alleges is the non-payment of that decree. This is not a new matter or thing, not before asserted, but simply a variation of allegations, as to a subject already in issue. The breach assigned in each count is identical in terms and effect; namely, the non-payment of one and the same decree. The Circuit Court erred in the charge given, and the judgment must be reversed, and the cause remanded.

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Bill of Review for Error Apparent, and Impeaching Decree for Fraud.

1. *Bill in double aspect, or in alternative.*—A bill in equity may be filed in a double aspect, or in the alternative; but, when so filed, the complainant must, in each aspect, be entitled to the same relief, and the same defenses must be applicable to each.

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2. *Same; bill of review for error apparent, and impeaching decree for fraud.*—A bill can not be maintained which seeks, in the alternative, to review a decree for error apparent, or to impeach and set it aside on the ground of fraud.

3. *Limitation to bill impeaching decree for fraud.*—A bill to impeach a decree for fraud, though not within the terms of the statute which bars a bill of review after the lapse of three years (Code, § 3843), must, by analogy, be governed by the same limitation.

APPEAL from the Chancery Court of Talladega.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 8th December, 1869, by the administrator *de bonis non* of the estate of John W. Gordon, deceased, against Mrs. Jane W. Gordon, the widow of said decedent, John W. R. Gordon, the only child of said John W. and Jane W. Gordon, and several other persons. Its object was to review, for error apparent, a decree rendered by said Chancery Court, at its February term, 1865, in favor of Mrs. Jane W. Gordon individually, against herself as administratrix of her husband's estate, Thomas R. Carter, as co-administrator with her, John W. R. Gordon, her minor son, and William A. Morris; or to impeach and set aside that decree, on the ground that it was procured by a fraudulent combination between Mrs. Gordon and said Carter, for the purpose of defeating and defrauding the creditors of said John W. Gordon's estate, and securing to herself and her infant son a valuable tract of land in Talladega, which John W. Gordon had bought, in September, 1862, from said W. A. Morris, and had paid the purchase-money, but had received only a bond for title; and for which the said decree here complained of directed said Morris to execute a conveyance to Mrs. Gordon and her son. The lands were afterwards divided between Mrs. Gordon and her son, under proceedings for partition in the Probate Court; and Mrs. Gordon having subsequently sold the lands allotted her on the division, to one Jesse B. Weisinger, he also was made a defendant to the bill in this cause, not having paid the entire purchase-money. John W. Gordon died in December, 1863, intestate; and letters of administration on his estate were duly granted to his widow and said Thomas R. Carter. In 1867, after the proceedings in the said chancery suit, they reported the estate insolvent, and it was so declared. The administrator *de bonis non*, by whom the bill in the present case was filed, sought to set aside the decree in the former cause, to remove the administration into the Chancery Court, and to have the lands appropriated to the payment of the debts filed against Gordon's estate. Mrs. Gordon married pending the suit, and her husband, Randolph Ross, was brought in as a defendant to the bill. The view taken of the case by this court renders it unnecessary to state in detail

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the facts disclosed by the record. The chancellor dismissed the bill, for want of equity, and his decree is now assigned as error.

JOHN T. HEFLIN, for the appellant, argued that the former chancery decree abounded with errors apparent on its face, and was fraudulent in fact and in law, as against the creditors of Gordon's estate, on the facts shown by the record; and he cited authorities to these points.

GEO. W. PARSONS, *contra*, contended that the bill could not be maintained as a bill of review, because barred by the statute of limitations; and that, as a bill impeaching the decree for fraud, its allegations were wanting in certainty and definiteness, and did not make out the charge of fraud; citing to this point the following authorities: *Spence v. Duren*, 4 Ala. 251; *Willingham v. Harrell*, 36 Ala. 583; Story's Eq. Pl. § 428; *Steele v. Kinkle*, 3 Ala. 352; *Smith's Heirs v. Br. Bank*, 21 Ala. 125; *Insurance Co. v. Pettway*, 24 Ala. 544; *Tompkins v. Nichols*, 53 Ala. 197.

BRICKELL, C. J.—The original bill was filed on the 8th day of December, 1869, and seeks to review, for errors apparent, a decree of the Court of Chancery, rendered on the 14th February, 1865. The decree is also impeached for fraud, and its vacation because of the fraud is another object of the bill, relief being prayed in each aspect of the case. It is certainly true, that bills in equity may be originally filed, or may be so amended, as to present the case of the complainant in a double aspect, or, as it is sometimes expressed, in the alternative. But, to prevent surprise, the embarrassment of the defendant in making defense, and the inextricable confusion which would follow from blending in one suit distinct causes of action, the rule is strictly observed, that each aspect, or alternative, must entitle the complainant to the same relief.—*Shields v. Barrow*, 17 How. 130; *Cresy v. Beavan*, 13 Sim. 353; *Micon v. Ashurst*, 55 Ala. 612; *Rives v. Walthall*, 38 Ala. 382. The same defenses must be applicable in each aspect in which the case is presented (*Campbell v. Reasky*, 1 Myl. & Cr. 618; *Attorney-General v. St. John's College*, 7 Sim. 257); otherwise, the bill will be multifarious. The same defenses cannot be made—the same matters are not open for consideration—the same relief cannot be granted—the objects and effect of a bill of review, and of a bill impeaching a decree for fraud, are essentially different. Without marring the order and simplicity of proceedings in a court of equity—introducing uncertainty and

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confusion, opening wide the door for surprise upon parties, against which the court could protect them only by directing the cause to stand over, as often as it appeared, prolonging litigation indefinitely,—a bill so repugnant and inconsistent cannot be sustained. If entertained as a bill of review, the former decree, so far as erroneous, would be reversed, and the court would proceed to retry the cause, rendering the decree the evidence would authorize. But, if fraud has infected the decree, it must be vacated entirely—there is no retrial of the cause. The incongruity of the two aspects, in which the complainant thus presents his case, is apparent, when it is subjected to the test suggested in *Rives v. Battle*, *supra*—a decree *pro confesso* against the defendants. What relief would then be granted? would the former decree be reviewed for error apparent, or would it be vacated for fraud? If the court adopted either aspect, it would proceed, more or less, on conjecture, and could not be sure that it was administering the relief to which the complainant was entitled. The bill unites different, distinct causes of action, requiring different defenses and different relief, and cannot be entertained.

Independent of this consideration, as a bill of review it was barred by the statute of limitations, more than three years (deducting the period from the rendition of the decree, to the 21st September, 1865) having elapsed before its filing, since the decree was rendered.—Code of 1876, § 3843. As a bill to impeach a decree for fraud, we think it must be also regarded as within the bar of the statute. True the statute does not, in terms, extend to bills impeaching a decree for fraud; nor is there any other statute which prescribes a bar to them. Courts of equity are reluctant to entertain demands which have not been prosecuted with reasonable diligence. “Nothing can call forth this court into activity,” said Lord CAMDEN, in *Smith v. Clay*, 3 Brown’s C. C. (note), 639, “but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing.” Though suits in equity were not originally within the words of statutes of limitation, which were directed especially against actions at law, or legal rights; yet the court obeyed them, whenever a legal title or demand was drawn within its concurrent jurisdiction, and applied them by analogy to all equitable titles and demands. As often as there was a change in these statutes, the court observed the change; hence, the settled doctrine, in the absence of an express statute otherwise limiting it, was, that a bill of review must be filed within the period which would, at common law, bar a writ of error. The statute now recognizes this

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doctrine, and in terms applies the statutes of limitation, so far as embraced in chapter 20, title 1, part 3, of the Code, to suits in equity.—Code of 1876, § 3758.

There was, at one time, much conflict of decision, in courts of law and of equity, as to the operation of statutes of limitations in cases of fraud. The statute now removes all room for doubt, by declaring that, "in actions seeking relief on the ground of fraud, when the statute has created a bar, the cause of action must not be considered as having accrued until the discovery by the aggrieved party of the facts constituting the fraud; after which, he must have one year within which to prosecute his suit."—Code of 1876, § 3202. A party, availing himself of this statute, would be required to aver with precision the facts and circumstances constituting the fraud—how and when these facts were discovered; what prevented a discovery before the bar of the statute was complete, and to acquit himself of all knowledge of facts which ought to have put him on inquiry.—*James v. James*, 55 Ala. 525; *Martin v. Br. Bank Decatur*, 31 Ala. 111; *Stearns v. Page*, 7 How. 319; *Badger v. Badger*, 2 Wall. 87; *Fisher v. Boody*, 1 Curtis, 206; *Carr v. Hilton*, *Id.* 390. The present bill does not contain such averments: it is very general in all its averments of the facts supposed to constitute fraud and collusion in the procurement of the decree impeached.

It is just and reasonable that there should be some limitation of time, within which a bill impeaching a decree for fraud, disquieting titles, reopening litigation, involving an accusation of moral turpitude, should be filed. There is the same reason for applying by analogy the statute limiting bills of review, that there was, in the absence of the statute, for applying to bills of review the statute limiting writs of error. The diligent cannot be injured; controversies will be commenced while the facts are recent, the parties probably in life, and witnesses living within the reach of the parties; and there will be less ground for apprehension that vexatious litigation is fostered. It is the diligent only the court should be active in relieving; and they have, under the statutes, ample time to vindicate their rights; and a just regard for the rights of those who are reposing on the decree requires that their diligence should be stimulated. The Supreme Court of Massachusetts, under statutes not differing materially from ours, held that a bill in equity, to impeach a decree for fraud, must, by analogy, be filed within the period limiting bills of review.—*Evans v. Beacon*, 99 Mass. 213; *Plymouth v. Russell Mills*, 7 Allen, 433. No reason is assigned, no excuse is offered, for the delay in filing the present bill; and by analogy it must be deemed barred.

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The chancellor gave the case a very thorough consideration, and upon the grounds we have stated, as well as those found in his opinion, we are satisfied with his conclusions.

Affirmed.

Steele v. Tutwiler.

Action on Special Supersedeas Bond.

1. *Special supersedeas bond; condition of, and what damages may be recovered.*—A special bond, executed by the defendant in a statutory action of ejectment, on appeal from a judgment for the plaintiff for the possession of the land, with damages and costs, conditioned that he “shall prosecute said appeal to effect, and pay and satisfy such judgment as the Supreme Court may render in the case” (Code, §§ 3927-28),—is fatally defective to supersede the judgment for the land; and the judgment being affirmed on the appeal, and the costs and damages paid, an action can not be maintained on the bond, to recover the rents of the land pending the appeal, or attorneys’ fees for services rendered on the appeal. (BRICKELL, C. J., dissenting.)

APPEAL from the Circuit Court of Greene.

Tried before the Hon. LUTHER R. SMITH.

This action was brought by Henry A. Tutwiler, against A. S. Steele, John J. Steele, and Robert Harkness; was commenced on the 31st August, 1877, and was founded on a penal bond executed by the defendants, which was in the following form: “Know all men by these presents, that we, Andrew S. Steele as principal, and John J. Steele and Robert Harkness as sureties, are held and firmly bound unto H. A. Tutwiler, in the sum of one thousand dollars; for the payment of which,” &c., in the usual form. “The condition of the above obligation is such, that whereas, at the Fall term, 1874, of the Circuit Court of said county, the said H. A. Tutwiler recovered a judgment against the said Andrew S. Steele, for the following lands, to-wit,” describing them; “also, for the sum of two hundred and fifty dollars damages for the detention of said lands, and the costs of suit: And whereas the said Andrew S. Steele hath this day made application for an appeal to the Supreme Court to reverse said judgment, and also for a *supersedeas* of the execution of said judgment, which has been granted on his entering into this bond: Now, if the said Andrew S. Steele shall prosecute said appeal to effect, and shall pay and satisfy such judgment as the Supreme Court of Alabama may render in this case, then this obligation to be void,” &c. This bond was dated “the —

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day of January," 1875, but was approved by the clerk on the 18th January; and the order of the circuit judge, Hon. L. R. SMITH, under which it was taken, was as follows: "It is ordered by the court, that a *supersedeas* issue in accordance with the prayer of petitioner, upon his entering into bond in the sum of \$1,000, with good and sufficient sureties, to be approved by the clerk of the Circuit Court of Greene county."

The complaint was in these words: "The plaintiff claims of the defendants the sum of one thousand dollars, for this: That whereas the said plaintiff" recovered the judgment described in the bond: "And whereas the said A. S. Steele did, on the 30th day of December, 1874, pray for and obtain an appeal from said judgment, to the Supreme Court of Alabama, by giving an appeal bond in the sum of five hundred dollars, to supersede that part of said judgment which was for two hundred and fifty dollars damages, without superseding the execution of the judgment of the court for the possession of the land: And whereas the plaintiff was proceeding to take possession of said lands, under a writ issued from the Circuit Court of said county of Greene, against said defendant, A. S. Steele: the plaintiff avers, that in order to supersede said judgment for the possession of said lands, the said defendant, A. S. Steele, did, on the 12th day of January, 1875, present his petition to the Hon. L. R. Smith, the judge of the seventh judicial circuit, praying for an order to supersede the execution of said judgment for the possession of said land; and plaintiff avers that Hon. L. R. Smith indorsed the following order upon said bond," setting out the order copied above; "and that, in compliance with said order, the defendant, A. S. Steele, as principal, with the other defendants, John J. Steele and Robert Harkness as sureties, made, signed, and filed in said Circuit Court, on the 18th January, 1875, with the clerk of said court, by whom it was approved, their bond as follows," setting out the bond here sued on. "Whereby plaintiff avers that the execution of said judgment was suspended, and the plaintiff was prevented from having the possession of the said lands delivered to him, from and after the 1st day of January, 1875, as was his right to do; and that the possession of said lands was thereby retained by the said Andrew S. Steele, pending the appeal of said cause in the Supreme Court, to-wit, during the years 1875 and 1876. And plaintiff avers that, on the hearing and trial of said cause by the Supreme Court of Alabama, the said judgment of said Circuit Court of Greene county, in favor of the plaintiff, was in all things affirmed by the judgment of said Supreme Court, rendered therein on the 24th day of

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May, 1877. And plaintiff avers, that the condition of the said bond, so made by the said defendants, and herein set forth, was and has been broken, in this: that the said Andrew S. Steele did not prosecute his said appeal to the said Supreme Court to effect, but, on the contrary, as heretofore set forth, the said judgment in the Circuit Court of Greene county, from which said appeal was taken, was in all things affirmed by the said Supreme Court. And plaintiff avers and alleges that, by reason of the execution and breach of said bond, he has suffered damage in the sum of one thousand dollars, in this: that he, the said plaintiff, has thereby been deprived of the use and possession, and of the rents of the said land, so recovered as aforesaid, since from, to-wit, the 1st day of January, 1875, until the 1st day of July, 1877; and plaintiff avers that the fair rental value of said land, during said period, was, to-wit, the sum of five hundred dollars *per annum*. And plaintiff avers that he has also suffered damage by reason of the execution of said bond, in this: that he was compelled to employ, and did employ an attorney to defend the appeal and the *supersedeas* of his said judgment for the recovery of the said lands, and the *supersedeas* of the writ of possession of said lands in the Supreme Court of Alabama."

The defendants demurred to the complaint, assigning twenty-two separate causes of demurrer, but the court overruled their demurrer; and they then filed eight pleas. Demurrers were interposed and sustained to several of these pleas; and the cause was finally submitted to the jury on issue joined on the pleas of performance and failure of consideration, and the plaintiff had a verdict and judgment for \$629.91 under the charge of the court. The overruling of the demurrer to the complaint is now assigned as error, together with various other rulings on the pleadings and evidence, and in the matter of charges given and refused.

SNEDECOR, COCKRELL & HEAD, and E. MORGAN, for appellant.

WEBB & TUTWILER, and W. P. WEBB, *contra*.

STONE, J.—When an appeal is taken to this court from a judgment or decree for the payment of money, rendered by a court of original jurisdiction, and the design is to suspend execution by a *supersedeas*, the statute has, in terms, prescribed the condition of the bond to be given. It is, "to prosecute the appeal to effect, and to satisfy such judgment as the Supreme Court may render in the premises."—Code of 1876, § 3927. Such bond suspends execution, until the

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judgment of this court is pronounced. This condition is plain and unambiguous. If this court reverse the judgment of the court below, and render no judgment here but for the costs of appeal, then the appeal is prosecuted to effect, and the condition of the bond is not broken. True, there is, in some cases, a liability resting on appellant to pay the costs adjudged against the appellee, when the same can not be made out of the latter; but this liability is declared by statute, and does not depend on any condition of the bond, or its breach. When there is a reversal, without more, there is no breach of the *supersedeas* bond, and no liability on the sureties. When such judgment or decree is affirmed on appeal, then the condition of the bond is broken, and the principal and sureties in the bond are held bound to satisfy such judgment as this court may render in the premises. The judgment which this court renders in such case is, an affirmance of the judgment appealed from—a merger of that judgment in ours, thus making it the judgment of this court. *Stephens v. Norris*, 15 Ala. 79.

But the legislature were aware that there would be judgments and decrees of courts, for the enforcement of rights, or compelling the performance of duties, other than the payment of money. In such cases, this court has no power to render a money judgment on the *supersedeas* bond. When such appeals are not prosecuted to effect, the most we can do is to render judgment against the appellant, for costs of the appeal, and affirm the judgment of the court below, thereby putting an end to the *supersedeas* of the execution, and leaving that court free to enforce its judgment or decree. If, in such case, the appellee is entitled to other or further relief, this court has no original power or jurisdiction to award it. It must be sought in a court of original jurisdiction, and in a separate action. Now, inasmuch as judgments and decrees are various in form and purpose, any uniform condition of a *supersedeas* bond would not be adapted to the varying forms of judicial relief. Hence, in cases of decrees or judgments for any thing other than the payment of money, the legislature has declared that, when an appeal with *supersedeas* is claimed, the chancellor, register, or judge, as the case may be, must “direct the amount and condition of the appeal bond;” which order must be entered on the minute-book of the court.—Code of 1876, § 3928.

We have here a legislative declaration, which has been followed by judicial interpretation, first, that to prosecute to effect, means to prosecute to a successful termination; second, that when a money judgment or decree is appealed from, the condition to prosecute to effect, and to satisfy such judgment

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as this court may render in the premises, secures every right the appellee is entitled to have secured; and, third, when the judgment or decree appealed from is not for the payment of money, then, to prosecute to effect, and pay the judgment of this court, is not a proper condition for a *superseas* bond.

In *Hughes v. Hatchett*, 55 Ala. 539, 547, speaking of *superseas* bonds, in cases like the present, we said: "It [the bond] should be framed in reference to the damages likely to ensue from delay. The order for a *superseas* bond in such case, and the bond itself, should not have the sole condition prescribed in section [3489] 3927. That condition is inadequate in such a case. They should require and provide indemnity against such damage and loss as the appellee may sustain by the appeal, in addition to the condition prescribed in section 3927 [3489]. We will not declare what shall, in all cases, be the condition of the *superseas* bond under section 3928 [3490]. Security and indemnity should be of prime consideration. This doubtless will require, that the judge or officer, prescribing the condition, shall take into the account any peculiar circumstances that may distinguish the case in hand. . . . We need scarcely add, that upon a bond so given, this court can render no judgment against the sureties, except for costs. Any recovery, beyond that, must be in a suit on the *superseas* bond."

In the case of the *United States v. Knight*, 14 Pet. 301, suit was brought on a bond with sureties, conditioned that B. K. and J. K. "shall continue true prisoners in the custody of the jailor, within the limits of the jail yard," &c. This bond bore date January, 1838. On the 4th January, 1800, Congress enacted, that persons imprisoned on process issued from any court of the United States, . . . in civil actions, shall be entitled to like privilege of the jails, or limits of the respective jails, as persons confined in like cases on process from the respective States are entitled to, and under the like regulations and restrictions." It was contended there was a breach of the bond, in this: that the statute of Massachusetts, of force in Maine when the act of Congress was passed (January, 1800), required the prisoners to sleep within the prison walls at night, and that the liability of these prisoners and their bondsmen must be determined by the State law as it then existed. They had not remained within the prison walls at night, but had enjoyed the liberty of the jail yard both day and night. The court said: "From the language of that act, a person imprisoned for debt was allowed to have a chamber and lodging in any of the houses or apartments belonging to the prison, and liberty of the yard within

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the day time. It was the construction put on these words, which made it necessary for the debtor to be within the walls of the prison in the night time. In the bond in question there is no such language. Whilst, therefore, the officer might have been liable for taking from the debtor a bond, not in conformity with the statute, but extending to him a greater privilege than was allowed by law; yet, in this case, the suit being on the bond, the parties are bound for nothing whatsoever but what is contained in the condition of the bond, whether it be or be not conformable with the law." The bond in that case had been framed according to the terms of a later regulation in regard to prison limits in Maine.

The case of *Mary Bein v. Heath*, 12 How. 168, was a suit on an injunction bond, to pay "all such damages as the said Mary Heath may recover against us, in case it should be decided that the said injunction was wrongfully obtained." The injunction had been dissolved, but no damages had been assessed or awarded against the obligors. This suit was brought to recover such damages. The court, C. J. TANEX, said: "The bond, in the case before us, is not one to pay the damages which the opposing party should sustain by reason of the injunction, but it is to pay the damages that might be recovered against them; obviously referring, we think, to the practice in Louisiana above mentioned. A court, proceeding according to the rules of equity, can not give a judgment against the obligors in an injunction bond, when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction. This was done by the Circuit Court in the former suit between the parties. No judgment was, or could be, given against the obligors, for debt or damages, and none were recovered against them previously to the institution of this suit. The contingency on which they agreed to pay has not, therefore, happened, and the condition of the bond is not broken; and consequently no action can be maintained upon it. It would be against the well-established rule of the Chancery Court, to extend the liability of the surety, by any equitable construction, beyond the terms of his contract."—*Douglass v. Douglass*, 21 Wall. 98; *Carder v. Martin*, 17 Mo. 41; *United States v. Thompson*, 1 Gallison, 383; *Ballard v. Noaks*, 1 Ark. 193; *Hobart v. Hilliard*, 11 Pick. 143; *Newcomb v. Worster*, 7 Allen, 198; *Karthauss v. Owings*, 6 Har. & Johns. 184; *Van Epps v. Walsh*, 1 Wood's C. C. 598. Sureties have the right to stand on the letter of their contract.—*Ellis v. Bibb*, 2 Stew. 63; *McKay v. Dodge*, 5 Ala. 388; *Harden v.*

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Brown, 18 Ala. 641; *Johnson v. Flint*, 34 Ala. 673; *Robertson v. Robertson*, 58 Ala. 68.

The condition of the bond sued on in this case is, to prosecute the appeal to effect, and to satisfy such judgment as the Supreme Court shall render in the premises. The appellant did not prosecute to effect, but it seems the judgment rendered by the Supreme Court has been paid. There is, then, a breach of the first condition of the bond only; namely, the appeal was not prosecuted to effect; and consequently, it would seem, the bondsmen are liable for all damage, if damage there could be, growing out of a failure to prosecute the appeal to a successful issue—namely, to a reversal of the judgment. Such right of action is so ridiculously absurd, that it affords another and conclusive reason for holding that the bond sued on in this case is not so framed as to cover either of the causes of grievance complained of. It is fatally defective as a bond to supersede the judgment for the recovery of lands, or the payment of attorney's fees. *Copeland v. Cunningham*, at present term; *Hamner v. Cobb*, 2 St. & Por. 383. The demurrer to the complaint should have been sustained.

Reversed, and, if desired by appellee, the cause will be remanded.

BRICKELL, C. J., dissenting.

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Bill in Equity by Heirs, to set aside Conveyance by Ancestor.

1. *Continuance of trustee's title; wife's statutory separate estate under deed.* Under a deed executed in 1846, by which the grantor, declaring his desire to make "a sure and permanent provision" for his wife, conveys lands and slaves to a trustee, "his heirs and assigns," in trust for the sole use and benefit of the wife during the term of her natural life; and, at the termination of said estate, "then the said lands and premises, and the said slaves and their future increase, to be held in trust by the said L." [trustee] "for the sole use and benefit of" her children by the grantor; the estate of the trustee terminates on the death of the wife, and the legal title then passes to the children who are remainder-men; and on the subsequent marriage of one of the daughters, her interest in the property is held by her as a part of her statutory separate estate.

2. *Statute of limitations; when available on demurrer.*—When a bill in chancery shows on its face that the relief prayed for is barred by the statute of limitations, the defense is available by demurrer.

3. *Same; averment of infancy.*—An averment in a bill in chancery, that the

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complainants' mother "was an infant under the age of twenty-one years" on a specified day, which was twelve years before the filing of the bill, being construed most strongly against the pleader, is not equivalent to an averment that she was an infant at a later day; and being thus construed, the bill shows on its face that the asserted claim is barred by the statute of limitations of ten years.

4. *Same; exception when judgment is arrested or reversed; dismissal of bill without prejudice.*—When the chancellor dismisses a bill generally, and his decree is so modified by this court, on appeal, as to order the dismissal without prejudice to the right of one of the complainants to sue again; a bill filed by the heirs of said complainant, within twelve months after such dismissal, is not within the statute (Code, § 3235) which allows a new action to be commenced within one year after the arrest or reversal of a judgment for the plaintiff, although the period prescribed as a bar has been completed since the commencement of the first action.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. H. AUSTILL.

The bill in this case was filed on the 12th October, 1877, by Elode Bercy and others, infants suing by their next friend, against Edward Bercy (their father), Giovanni Lavretta, and Henry Molloy; and sought to annul and set aside, so far as the rights of the complainants were affected, a deed of conveyance for a lot or parcel of land in the city of Mobile, executed by their father and mother to said Molloy and one Horgan, who afterwards sold and conveyed to said Lavretta; also, an account of the rents and profits, and general relief. The bill alleged, that the complainants were the only children and heirs-at-law of Eleanor Bercy, deceased, and said Edward Bercy, one of the defendants; that their said mother and her sister, Helen Schaffer, were the only children of Foloe Pinta and his wife, Marie Victorine Pinta, late of Mobile, both of whom died long before the filing of the bill; that the said Eleanor Bercy, complainants' mother, died on the 26th July, 1877, and their father resided in the city of New Orleans; and that the lot or tract of land now sued for was, with other property, conveyed by said Foloe Pinta, in 1846, by deed, to one La Fargue as trustee; under which deed complainants derived their asserted interest in said land, and a copy of which was made an exhibit to their bill.

The following are the material portions of this deed: "This indenture, made this the 5th day of May, in the year of our Lord one thousand, eight hundred and forty-six, between Foloe Pinta of the first part, Alexander La Fargue of the second part, trustee, and Marie Victorine Pinta, wife of the said Foloe, of the third part: *Whereas*, the said Foloe Pinta is at this time free from debt, and is willing and desirous to make some sure and permanent provision for the support of his said wife out of his estate; now this indenture *witnesseth*, that the said Foloe Pinta, for and in consideration of the premises, and for the further consideration of one dollar to

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him in hand paid by the said Alexander La Fargue, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath given, granted, bargained and sold, and by these presents *do* give, grant, bargain and sell, unto the said Alexander La Fargue, his heirs and assigns forever, all and singular the following real and personal estate, to-wit," describing the land; "also, a negro woman named Phillis, aged about twenty years, and her child Louisa, aged about eight months. *To have and to hold* the above described lots, pieces, and parcels of land and premises, with the appurtenances, and also the said slaves, with their future increase, unto him, the said Alexander La Fargue, and his heirs and assigns, free from the claim or claims of all and every person or persons whomsoever; *in trust*, nevertheless, and upon this express condition: that the said Alexander La Fargue shall have (?) the said lands and premises, and the said slaves and their future increase, for the sole use and benefit of my said wife, Marie Victorine Pinta, during the term of her natural life; allowing to my said wife the use and occupation of the said lands and premises, and the use and hire of the said slaves and their future increase, to be possessed and managed as to her may seem proper, during the term aforesaid; and at the termination of said estate of my said wife, then the said land and premises, and the said slaves and their future increase, to be held in trust by the said Alexander La Fargue, for the sole use and benefit of such child or children as my said wife, Marie Victorine, may have by me, the said Foloe Pinta, and to their heirs forever. Should my said wife, however, during her life desire that the said lands and premises above described, or any part thereof, or the said slaves and their future increase, or any or all of them, be disposed of for other property or funds, then the said Alexander La Fargue, upon the written request of the said Marie Victorine Pinta (my said wife), shall be fully authorized and empowered to make sale of said lands and premises, and the said slaves with their future increase, to such person or persons, and upon such terms, as my said wife in writing may request; and such property or funds, so acquired by the sale of said premises, shall be held in like manner, and for the same uses and purposes, as the said lots and slaves *is* now conveyed and desired to be held. And the said Alexander La Fargue, for himself and his heirs, *do* hereby accept the trust reposed in him by these presents, and engages to fulfill the same according to the true intent and meaning hereof. In witness whereof," &c.

The bill further alleged that, on the 13th July, 1862, the mother and father of the complainants conveyed the said

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lands by deed to said Henry Molloy and Paul Horgan, for the sum of \$3,000 in Confederate treasury-notes; "that, at the time of signing said deed, their mother, said Eleanor, was an infant under the age of twenty-one years;" that Molloy and Horgan sold and conveyed the said lands to the defendant Lavretta, by deed dated the 13th February, 1873; that Lavretta was in possession at the filing of the bill, and receiving the rents and profits; that said Horgan was dead, and that no administration had been granted on his estate. The bill contained, also, the following allegations: (7.) "That the said Eleanor, mother of complainants, together with her sister, Helen Schaffer, whom she was advised it was necessary to join with her, did, on the 22d day of January, 1874, file a bill in this honorable court, against the said Molloy and Horgan, and Giovanni Lavretta and others; in which they prayed that their respective deeds, made by them to said Molloy and Horgan, should be declared void, and that the same be cancelled, and for such other and further relief as said court should decree proper under the circumstances of the case: That answers to said bill were duly filed by said Molloy and Horgan, and said Lavretta and other defendants thereto; and that upon the hearing of the said cause, the same was dismissed by the decree of this honorable court: That an appeal was taken by the said Helen Schaffer and Eleanor Bercy in said suit, from the decree of this honorable court, to the Supreme Court of the State of Alabama: That the same was argued at the December term, 1876, of the said Supreme Court; and at the June term thereof, 1877, a decree was rendered by the said Supreme Court, modifying the decree of this honorable court, by dismissing said bill without prejudice to the mother of complainants, said Eleanor Bercy, to sue again: That the said cause was, at the June term, 1877, of this honorable court, dismissed therefrom, in strict conformity with the decree of the said Supreme Court."

"(9.) Complainants further show, that said deeds from their parents, Edward and Eleanor Bercy, to said Molloy and Horgan, and from said Molloy and Horgan to said Lavretta, form a cloud upon their title to their undivided half interest in said lot of land, which a court of equity alone has power to remove; and that, unless said deeds are cancelled, or declared null and void, the undivided half interest belonging to complainants will be of no value.

"(10.) Complainants further say, that they are informed, and upon this information charge, that the sale to said Molloy and Horgan was for a very inconsiderable price, paid in Confederate treasury-notes; that their said mother did not

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sign said deed freely, and of her own accord, but was induced to do so through the fear and threats of her said husband; that she never received any of the purchase-money, or any of the benefits thereof, nor have complainants ever received anything from said sale; that they are entirely destitute of property or means, and their said father is insolvent; that their said mother never did in her life-time ratify, affirm, or give assent to said deed, after she came of age; that her rights in the said premises, and the right to sue therefor after she came of age, was unknown to her, and was concealed from her by her said husband, who opposed any interference on her part; that after she ascertained that she probably had a right of action, her said husband refused to let a suit be brought, alleging that he was trustee under the Code of Alabama, and had the right to control said property; and their said mother, being an uneducated and uninformed woman, and under the influence of her said husband, (?) until the filing of her said bill as before alleged: That immediately after the dismissal of said suit by the Supreme Court, she directed her attorney to bring another suit, which was done by her attorney; but it appeared that she died a few days before said last bill was filed."

"Complainants insist that, under the facts stated, the said Edward Bercy forfeited his interest in said land by his conduct and sale, and did not become entitled to a life-estate under his wife at her death, nor by the laws of this State; and that the said Lavretta cannot avail himself of the estate of the said husband, and that complainants are entitled to the immediate possession of the said lot on the setting aside of said deeds. But, if complainants should be wrong in this, and are not entitled to an account and possession until after the death of their said father, then they allege that, by delay in this behalf, their right to the remainder would be lost or impaired by the death of witnesses and the lapse of time, and the outstanding deed of their said mother might ripen into a good title, or at least continue (?) a cloud on complainants' title. Wherefore," on the setting aside of the deed, they prayed further relief in the alternative, as the court might determine in reference to the rights of their father.

The defendants Lavretta and Molloy filed a joint demurrer, assigning the following (with other) causes of demurrer: 1st, that the cause of action set forth in the bill is barred by the statute of limitations of ten years; 2d, that the bill shows on its face that Lavretta, and Molloy and Horgan under whom he claims, have had adverse possession of the premises sued for, for more than ten years next preceding the filing of the

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bill. The chancellor sustained the demurrer on these grounds, and dismissed the bill; and his decree is now assigned as error.

JOHN T. TAYLOR, ST. PAUL & LABUZAN, and THOS. E. McCARTNEY, for appellants.—The bill does not, on its face, show that the complainants are barred by the statute of limitations; and hence it was not demurrable on that ground. It only avers that their mother was under twenty-one years of age, in 1862, when she signed the deed to Molloy and Horgan, but does not state her age at that time, nor the time when she attained majority, nor any other fact from which her age may be inferred. As to all these matters, the court must indulge in conjectures, in order to hold the bill demurrable. But the statute did not run against Mrs. Bercy in the prosecution of this claim, because she was under the double disability of infancy and coverture when her rights accrued, and her coverture did not terminate until her death in July, 1877. This cannot be disputed, if the deed of her father creates in her an equitable separate estate; and that such is the operation and effect of the deed, is shown by numerous decisions construing similar deeds.—18 Ala. 84; 19 Ala. 146, 373; 20 Ala. 721; 26 Ala. 213, 332; 38 Ala. 115; 39 Ala. 514; 43 Ala. 338. But, even if Mrs. Bercy held the property as her statutory separate estate, her claim was not barred when she filed her former bill jointly with her sister; and that bill was dismissed without prejudice to her right to sue again. Such dismissal would be without effect or meaning, unless it is construed to give the party the same standing in court that she had when her bill was dismissed. To dismiss without prejudice, when the claim is already barred by the statute, is nugatory, unless it secures the right to sue again notwithstanding the bar. When the first bill was thus dismissed, the parties stood exactly as they did when it was filed, notwithstanding the lapse of the intervening time; and the new bill takes the place of the old, without the misjoinder which was fatal to it. At law, where the plaintiff recovers a judgment, and his suit is dismissed, or the judgment arrested or reversed on error, he is allowed one year to bring a new suit.—Code, § 3235. By analogy to this statute, a dismissal without prejudice should be allowed the same effect. It must be remembered, too, that Mrs. Bercy was under the disabilities of infancy and coverture, and under the forcible control of her husband, who, as her trustee, had the right to the use and possession of her property, and who fraudulently deceived and imposed on her; and the defendant now seeks to avail himself of this fraud and imposition

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of the husband, under the plea of the statute of limitations.

BOYLES & OVERALL, *contra*, cited *Schaffer v. Lavretta*, 57 Ala. 14; *Molton v. Henderson*, at the last term; *Fleming v. Gilmer*, 35 Ala. 62; *Daniel v. Day*, 51 Ala. 431.

STONE, J.—The deed of Foloe Pinta, of date May 5th, 1846, secured to his wife, Marie Victorine Pinta, an equitable separate estate in the property therein conveyed, for and during the term of her natural life, remainder to her children begotten by the said Foloe. Eleanor Bercy, mother of the complainants in this suit, was one of the children of that marriage. The deed contains no words of exclusion, as to the interests which the children took as remainder-men. When Eleanor intermarried with Mr. Bercy, her interest in the property in controversy in this suit became her statutory separate estate, subject to all the rules which govern that species of estate. In 1862, Bercy and wife conveyed the lands in controversy to Molloy and Horgan, by deed of bargain and sale, who subsequently conveyed to Lavretta, the present adverse claimant. In the case of *Schaffer v. Lavretta*, 57 Ala. 14, construing the deed of Foloe Pinta, under which the present complainants assert title, we held, that the title of the trustee named in the deed terminated at the death of Mrs. Pinta, and that Mrs. Bercy took, freed from the trust imposed by the deed. We have no inclination to disturb, or re-examine that ruling. The title of Mrs. Bercy, then, became a naked statutory separate estate, of which her husband was the trustee.

The ground on which complainants seek to avoid the deed of Bercy and wife to Molloy and Horgan, made in 1862, is that Mrs. Bercy was then an infant under twenty-one years of age. Such is the averment of the bill; and it is not shown when she attained the age of twenty-one years. The entire averment is, "that at the time of signing said deed, their mother, said Eleanor, was an infant under the age of twenty-one years." Mrs. Bercy died in July, 1877, leaving her husband surviving her; and the present bill was filed in October, 1877. Molloy and Horgan, and Lavretta under them, have held adversely, and under claim of title, ever since the purchase of the former, in July, 1862. It is assigned as ground of demurrer to the bill, that it shows on its face that Lavretta, and those whose title he has, have had adverse possession of the property sued for, for more than ten years before the bringing of this suit. The chancellor sustained this ground of demurrer, and appellants assign this ruling as error. Complainants contend, that, inasmuch as the bill

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does not clearly show that Mrs. Bercy had been of lawful age of twenty-one years, for ten years before this suit was brought, the defendants should have been put to their plea of the statute of limitations, when all the facts could have been brought out in evidence.

If it be shown by the bill that the relief prayed for is barred by the statute of limitations, the defense is available by demurrer.—1 Brick. Dig. 699, § 859. The statutes of limitation, in this State, are expressly made applicable to suits in chancery; and the exception in favor of married women, allowing them a time within which to sue, after the removal of their disabilities, does not extend to, or enlarge the time in which she may sue, in respect to her statutory separate estate.—Code of 1876, §§ 3758, 3759, 3225, 3236. The inquiry, then, is, does the bill show the present claim is barred by the limitation of ten years?

The established rule is, that pleadings must be construed most strongly against the pleader.—1 Brick. Dig. 701, §§ 903, 895, 896. The averment of this bill, as we have shown, is, that Eleanor, mother of complainants, was an infant under twenty-one years of age, when she executed the conveyance. Age of a person is not of the class of facts which, being proved to have existed at a given time, is presumed to continue in *statu quo*, until the contrary is shown. It is not a fact in its nature continuous, but is ever changing with the flight of time.—1 Brick. Dig. 806, §§ 32 *et seq.* The averment that Mrs. Bercy was an infant under twenty-one years of age in July, 1862, is not an averment that she was an infant at any later period. Such an averment, standing alone and unaided, rather negatives the idea that she remained an infant at a later date.

Another view: The general rule is, that when lands are adversely held and occupied for ten years, all persons, even the rightful owner, are barred the right of entry. There is an exception in favor of infants, &c.; but it is only an exception to a rule. Whoever relies on the exception, to relieve him from the operation of the general rule, must state facts which show he is within the exception. Failing to do so, the courts presume the case falls within the general rule. The statutes of limitation were suspended in this State, from January 11th, 1861, to September 21st, 1865. On the day last named, the statute commenced running against Mrs. Bercy. The present suit was commenced more than twelve years afterwards. The chancellor did not err in sustaining the demurrer to complainants' bill.—*Molton v. Henderson*, at the last term.

It is claimed for appellants, that their case is within the

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influence of section 3235 of the Code of 1876, and therefore the statute does not bar their suit. The averments of the present bill, which are supposed to bring this case within the influence of that section, are, "That the said Eleanor, mother of complainants, together with her sister, Helen Schaffer, whom she was advised it was necessary to join with her, did on the 22d day of January, 1874, file a bill in this honorable court, against the said Molloy and Horgan, and Giovanni Lavretta and others, in which they prayed that their respective deeds, made by them to said Molloy and Horgan, should be declared void, and that the same be cancelled; and for such other and further relief as said court should deem proper under the circumstances of the case: That answers to said bill were duly filed by said Molloy and Horgan, and said Lavretta and other defendants thereto; and that upon the hearing of said cause, the same was dismissed by decree of this honorable court: That an appeal was taken by the said Helen Schaffer and Eleanor Bercy in said suit, from the decree of this honorable court, to the Supreme Court of the State of Alabama: That the same was argued at the December term, 1876, of the said Supreme Court; and at the June term, 1877, thereof, a decree was rendered, modifying the decree of this honorable court, by dismissing said bill without prejudice to the mother of complainants, said Eleanor Bercy, to sue again: That the said cause was, at the June term, 1877, of this honorable court, dismissed therefrom, in strict conformity with the decree of the said Supreme Court." It is manifest that this averment falls very far short of making a case within section 3235 of the Code. Not to mention its failure to show the ground on which the bill first filed was dismissed out of the Chancery Court, and out of this court, it does not present a case of 'judgment rendered for the plaintiff,' and such judgment 'arrested, or reversed on appeal.'

We consider it unnecessary to notice any other question raised in this cause.

The decree of the chancellor is affirmed.

[Ex parte Branch & Co.]

Ex parte Branch & Co.

Application for Prohibition to Chancellor.

1. *Chancellor's authority in vacation; when prohibition lies.*—The times and places of holding the several Chancery Courts, and the duration of, the terms of the court, being prescribed by law, the chancellor can not hold court at any other time or place, nor exercise any judicial functions in vacation, except as specially authorized by statute, or by the rules of practice prescribed by this court under the power vested in it by law; and any improper exercise, or attempted exercise by him, of such judicial functions in vacation, would be controlled by prohibition issued from this court.

2. *Same; confirmation of report of sale.*—Under the first rule of chancery practice, which was adopted in 1854, and which declares that the Chancery Court "shall be deemed always open," among other purposes, "for carrying into execution the decrees and orders of such courts and chancellors," the chancellor has power in vacation to confirm the register's report of a sale made under a decree foreclosing a mortgage, although such report is required to be read "in open court," and must lie over one day before confirmation.

Application by petition by Thomas Branch & Co. and others, for a writ of prohibition, or other remedial writ, directed to Hon. CHARLES TURNER, chancellor of the Middle Chancery Division, to restrain the confirmation by him, in vacation, of a report of sale made by the register in chancery at Selma, under a decree foreclosing a mortgage.

WATTS & SONS, and W. C. WARD, for the petitioners, cited *Cullum v. Casey & Co.*, 1 Ala. 351; *Byrd v. McDaniel*, 26 Ala. 582; *Garlick v. Dunn*, 42 Ala. 404; *Wightman v. Karsner*, 20 Ala. 446; *Coleman v. Smith*, 55 Ala. 368; 94th Rule of Chancery Practice.

PETTUS & DAWSON, with S. F. RICE, *contra*, cited the 1st Rule of Chancery Practice.

BRICKELL, C. J.—This is an application for a prohibition, or other remedial writ, directed to the chancellor of the Middle Division, commanding him to desist from proceeding, against the objection of the relators, who appear to be parties in interest, to the confirmation, on any other than a day of the appointed term of the court, of a sale of the railroad, franchises, fixtures, rolling stock, and other property of the Selma, Rome and Dalton Railroad Company, made by the register of the fifth district, under a foreclosure decree.

[Ex parte Branch & Co.]

The ground of the application is, that, except in term time, at the time and place appointed by law, the Court of Chancery is without jurisdiction to render a decree of confirmation, and such decree, if rendered, would be void, producing disorder and confusion in the administration of justice, beclouding and embarrassing the rights of the parties in interest.

The constitution declares, "a Court of Chancery shall be held in each district, at a place to be fixed by law, at least once in each year." The constitutional mandate is satisfied, when a time and place is appointed by the General Assembly, for an annual continuous sitting of the court, in the full exercise of the jurisdiction with which it is clothed. * A *term*, and a *place* of sitting, have been so long by the General Assembly appointed for every court of record, whether of superior or inferior jurisdiction, that involuntarily we regard them as elements of jurisdiction, and that rightfully judicial functions, unless it is otherwise expressly provided, can be exercised only when the court is in actual session at the appointed *time* and *place*. ^ A court was, when the king was the sole dispenser of justice, defined as "the house or place where the king remaineth with his retinue." When and since the authority to hear and determine controversies has been delegated to constituted tribunals, a court is generally defined as "the place where justice is administered." When judges were created, to whom the judicial power residing in the sovereign was delegated, for a time they were accustomed to attend the sovereign, and exercise the power only while in attendance on him. One of the guaranties of *Magna Charta* is, that the court—the power exercising judicial functions—should not migrate with the king, but should hold its sittings at a place and time fixed and settled. x If the law should not, however, appoint a place for the sitting of a court, it would doubtless rest in the power of the judge to appoint the time and place of the sitting; and the only limitation of the power would be, that the place should be within the territory of his jurisdiction. But, when the law prescribes the *time* and *place*, *time* and *place* are as essential elements of jurisdiction, as *subject-matter* and *parties*.—*Cullum v. Casey*, 1 Ala. 351; *Wightman v. Karsner*, 20 Ala. 446; *Garlick v. Dunn*, 42 Ala. 404. The interval between terms—that is, between the end of one term, and the beginning of another—would be vacation. During that interval, there would be no court; and a judgment or decree, rendered within it, would be *wanting in the color of judicial authority*. Freeman on Judgments, § 121.

The *time* and *place*, and duration of the terms of the Court

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of Chancery, for the several districts composing the Middle Division, are prescribed by statute. Unless it is otherwise provided by law, it is only during these terms the courts are open, and judicial functions can be exercised. If the chancellor should, without the authority of law, during the interval between the terms, in vacation, assume to exercise judicial power, it would be the appropriate office of a writ of prohibition to compel him to desist. The point of controversy is, whether there is not authority of law, for the court, in the interval between the regular terms, to exercise the power of confirming or disaffirming a sale made by the register in obedience to it, and in the execution of a decree regularly rendered in term time.

The Code declares, that all the rules of chancery practice adopted by this court, in force at the time of its adoption, and not inconsistent with its provisions, are recognized; and further, power is granted to this court, "to adopt such other rules to regulate the practice of the Court of Chancery, or such modifications of the existing rules, as they may deem proper, and also to furnish forms of proceeding, to mould the process of the Chancery Court, and to prescribe rules of evidence in the same, from time to time, as experience may determine that the existing rules do not fully meet the ends of public justice."—Code of 1876, § 3915. In the exercise of the power conferred by this statute, this court, at the June term, 1854, adopted a body of rules, entitled, "Revised Rules, in conformity with the Code, for the regulation of the practice in chancery in the State of Alabama." Though entitled "*Revised Rules*," they were more than a mere compilation, amending, correcting, and rearranging former and existing rules. They wrought, in many respects, radical changes in the former practice, and introduced many new rules, designed to simplify the practice, and to speed the hearing and final determination of causes pending in the Court of Chancery. The first of these rules, yet remaining in force, unaltered and unchanged, is, "that the Courts of Chancery shall be deemed always open, for the purpose of filing bills, answers, and other pleadings; for issuing and returning original and mesne process, and commissions by the register; and for making by and before the chancellor all interlocutory motions, orders, decrees, and other proceedings not affecting the merits of causes, but preparatory to their hearing upon the merits; and, also, for carrying into execution the decrees and orders of such Chancery Courts and chancellors. This rule includes the hearing of appeals from the register; which motions and appeals can be heard, in vacation, at any time or place (within the State), upon ten days' notice of the

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time and place of making the same, and the decree or order made and forwarded to the register from that or any other place."

It is obvious, that, as to the matters and judicial functions which are so carefully enumerated in this rule, the Court of Chancery is never closed—there is no vacation—no interval between terms, when of these matters the court or chancellor has not jurisdiction, and these judicial functions may not be exercised. As to these matters and functions, the court is to be *deemed*—that is, *judged, estimated—as always open*; and it may be remarked that, as to the hearing of appeals from the register, territorial jurisdiction is enlarged. The court or chancellor is not confined to the district in which the cause is pending, nor to his particular division; at any place within the State, such appeals may be heard. The plain purpose of the rule is, not only to speed the hearing of causes upon the merits, but the execution of the decrees and orders of the chancellor and of the court, whether the decree and order is interlocutory or final, so that there may not be unnecessary delay in the final determination of causes, to the reproach of the administration of justice.

A decree of foreclosure and sale, rendered on a bill to foreclose a mortgage, as was the decree we have before us, is a final decree in the sense of a court of equity, from which an appeal will lie. The subsequent proceedings on the decree—the sale, and its confirmation—are merely modes of enforcing the rights of the mortgagee, and for the benefit of the mortgagor.—*Whiting v. Bank of U. S.*, 13 Peters, 15; *Forgay v. Conrad*, 6 How. (U. S.) 203; *Bronson v. Railroad Company*, 2 Black (U. S.), 524. The sale, when made in pursuance of the decree, is incomplete; the decree of foreclosure and sale is not executed, until the confirmation by the court. It rests rather in negotiation: the bidder makes a proposition, which he has not the liberty of retracting, to the court, who is, in legal contemplation, the vendor, and which the court may accept or reject.—2 Jones on Mort. § 1637; *Hutton v. Williams*, 35 Ala. 503. Until acceptance, the sale is *in fieri*. Such being the character of the sale, and of the decree of confirmation, it seems to us that its confirmation is, within the letter and spirit of the first rule, a matter for which the Court of Chancery must be "*deemed always open*."

A narrow construction of this rule would defeat the purposes of its adoption, and would unnecessarily cripple the powers of the court. The report of sale made by a register is certainly subject to exception, and is certainly one of those reports which, according to the 94th rule of chancery practice, must be read in *open court*, and lie over one day for con-

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firmation. The term "*open court*" cannot have any other signification, in this rule, than that which is given it by the first rule. *Open court*, in each rule, signifies the time when the court can properly exercise functions.

We cannot declare that the Court of Chancery was without jurisdiction to confirm, at the time the decree of confirmation was rendered, the sale made by the register. Having jurisdiction, whether error or irregularity has intervened in its exercise, is not now open to inquiry. The application must be denied.

STONE, J., not sitting.

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Bill in Equity to Enforce Vendor's Lien on Land.

1. *Decree against non-resident, on publication.*—Under the statute which was of force prior to the adoption of the Code (Clay's Digest, 353, § 45), the complainant in a chancery cause was required, before obtaining a decree against a non-resident defendant who was brought in by publication only, to give bond conditioned for the restitution of the property to abide the order of the court; and the failure to require such bond was an error, for which the decree would be reversed.

2. *Same.*—Under the present statute (Code, §§ 3830-35), although it is provided that a decree against a non-resident defendant, who has not appeared, "is not absolute for eighteen months from the rendition thereof," unless that period is shortened by personal service of a copy of the decree, and that the plaintiff must give a restitution bond "before the execution of such decree," and that the court must direct a copy of the decree to be sent to such defendant; and although the court, in entering the decree, should require these things to be done, and the failure to comply with them would be good cause for refusing to confirm a sale under the decree, or for setting it aside; yet the decree is not reversible on error for want of any or all of them.

3. *Publication against non-resident.*—A recital in a decree *pro confesso*, against a non-resident defendant, that a copy of the order of publication "has been sent to the post-office of said defendant," does not show a compliance with the rule of practice (No. 25), which requires that a copy shall be "sent to the defendant," at his post-office when known.

4. *Appearance; when not shown by recitals.*—When a decree *pro confesso* has been entered against two defendants, on personal service as to one, and on publication against the other as a non-resident, and is afterwards set aside "parties consenting," this is not sufficient to show an appearance by the non-resident defendant, and thus cure the defects in the decree *pro confesso* against him.

5. *Notice of amendment of bill.*—When a decree *pro confesso* has been regularly entered against a non-resident defendant on publication, this does not dispense with the necessity of giving him notice of an amendment of the bill, as required by the rule of practice (No. 47); that is, by entering notice of the amendment on the order-book.

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APPEAL from the Chancery Court of Crenshaw.

Heard before the Hon. H. AUSTILL.

The bill in this case was filed on the 16th March, 1877, by James Tell, as the administrator of the estate of Bennett B. Bass, deceased, against John Ramer and Alfred Holly; and sought to subject a certain tract of land, in the possession of said Holly, to the payment of the purchase-money due to the estate of Bass. According to the allegations of the original bill, Bass sold and conveyed the land to Ramer in January, 1860, and placed him in possession, but received no part of the agreed price (\$900), and took no notes for the purchase-money; and in September afterwards, the purchase-money being still unpaid, he sold the land, for the same price, to said Holly, to whom Ramer then executed a conveyance, and delivered the possession; but Holly paid no part of the money, and did not give his notes for it. An amended bill was afterwards filed, which alleged that, at the time the contract was made between Bass and Holly, the contract between Ramer and Bass was rescinded, and Ramer conveyed to Holly at the request of Bass. A decree *pro confesso* was taken against each of the defendants; against Ramer, on personal service; and against Holly, on publication against him as a non-resident. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, and ordered a sale of the land. From this decree Holly only appeals, and here assigns it as error, with numerous irregularities in the proceedings, which will be understood from the opinion of the court.

J. M. WHITEHEAD, and J. D. GARDNER, for appellant.

W. D. ROBERTS, *contra*.

STONE, J.—The decree in this cause was rendered without personal service on Alfred Holly, the only defendant whose property rights are affected by it. Publication was made as to him, and a decree *pro confesso* rendered thereon.

The decree orders the sale of lands, as the property of Alfred Holly, and under it certain lands have been sold. The chancellor, in rendering his decree, did not require of complainant, the party interested, a bond conditioned “to account for the value, rents and profits of any real estate transferred by the operation of such decree;” and we are not informed such bond was given.—Code of 1876, § 3834. This is assigned as error.

Under the “act empowering courts of equity to proceed against absent defendants,” approved February 1st, 1805

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(Clay's Dig. 353, § 45), the complainant was required, before obtaining a decree against any defendant who was notified by publication, and who did not personally appear, to "give good and sufficient security, in such sum as the court may direct, to abide such order touching the restitution of the estate or effects to be affected by such decree, as the court may make concerning the same," &c. It was uniformly held, that a decree rendered against a non-resident, notified only by publication, would be reversed in this court, if it failed to require such bond.—1 Brick. Dig. 730, § 1318.

The statute which governs this case reads as follows: "It is no objection to the execution of a decree rendered against a defendant, that it was founded a bill taken *pro confesso* without personal service; but, before the execution of such decree, the plaintiff, or party interested, must give bond with two sureties, payable to and approved by the register, in a penalty to be prescribed by the chancellor or such register, conditioned," &c.—Code of 1876, § 3834.

Section 3835 of the Code declares, that "Where personal service of a decree rendered under the provisions of this chapter is made by serving the defendant with a copy of such decree, the same is conclusive and binding on him, if the petition to set aside such decree is not made within six months from such service."

Section 3830 of the Code contains this provision: "A decree made against a defendant, without personal service, who does not appear, is not absolute for eighteen months from the rendition thereof; and in such case, the court must direct a copy of the decree to be sent to such defendant," &c.

Section 3831 provides, that "such defendants may file a petition to set aside such decree, and to defend the suit on the merits, at any time within eighteen months; and upon sufficient cause shown, the chancellor has full power to open the decree, and to hear the cause, as if no decree had been rendered."

We think all these provisions must be construed in *pari materia*, as constituting one system. Section 3830 declares, that "a decree made against a defendant, without personal service, who does not appear, is not absolute for eighteen months from the rendition thereof;" and this section provides that, "in such case, the court must direct a copy of the decree to be sent to such defendant." What is meant by the words "not absolute," is shown in the next section, 3831. For the term of eighteen months, the chancellor, on petition filed, "has full power to open the decree, and to hear the cause, as if no decree had been rendered." Section 3835 provides, that this period of eighteen months may be

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shortened, by having personal service of the decree made on the defendant affected by it; in which event, "the same is conclusive and binding on him, if the petition to set aside such decree is not made within six months after such service." These clauses are plain and unambiguous. Section 3834 of the Code relates to all decrees rendered without personal service, and requires bond to be given by the complainant, or party interested, if he wish to have execution of his decree before it becomes absolute under sections 3830, 3831, 3835 of the Code. After the decree becomes absolute, no such bond is necessary.

The record in the present case fails to show that the court directed a copy of the decree to be sent to the defendant Holly, and, as we have shown, it fails to show the court required complainant to give bond, before he had execution of his decree. Evidently, it was the duty of the Chancery Court to require both these things to be done. What is the effect of the silence of the record upon these questions?

The act of 1805, and section 3834 of the Code of 1876, are different in phraseology. The former declared that, before obtaining a decree against a party who was notified by publication, and who did not appear, the complainant should give bond. This must precede the decree itself. The Code, section 3834, contains no such inhibitory clause, but provides that, before the execution of such decree, such bond shall be given. This is not a prohibition against making the decree, as the former statute was, but only forbids its execution, until restitution bond is executed. The court, in rendering such decree, should make an order that the decree shall not be executed, until the complainant, or party interested, execute the bond the statute requires. But, inasmuch as this is not made a condition precedent to the rendering of the decree, it is no ground for its reversal. It would furnish good ground for refusing to confirm the sale, or for setting it aside, if moved for within a reasonable time.—*McCullum v. Hubbert*, 13 Ala. 289; *Daniel v. Modawell*, 22 Ala. 365; *McCaskell v. Lee*, 39 Ala. 131; *Mobile Cotton Press Co. v. Moore & Magee*, 9 Por. 679; *Lankford v. Jackson*, 21 Ala. 626.

Section 3830 of the Code directs that, when a decree is rendered without personal service, the party not appearing, "the court must direct a copy of the decree to be sent to such defendant." This should always be complied with; and if neglected, we will not say the decree would become absolute at the end of eighteen months. This duty, like the one last above considered, is subsequent to the rendering of the decree, and its omission furnishes no ground of reversal.

Section 3823 of the Code authorizes a decree *pro confesso*

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to be taken, "on the failure of the defendant to answer or plead to the bill, within thirty days . . . after the period specified in the order of publication to answer, if the publication required by the order has been perfected." In the decree *pro confesso* rendered against Holly in this case, the recital is "that notice of the same [the publication] has been posted at the court-house door where said Chancery Court is held, and a copy of said notice has been sent to the post-office of said defendant." The rule of practice (No. 25) requires the register to send a copy of the publication "by mail, to the defendant, when his residence is shown by the bill or affidavit." The post-office of the defendant, Holly, was shown by the affidavit of complainant's solicitor, and the copy should have been sent to him. Sending it to the "post-office" of the defendant, is not necessarily sending it to the defendant at his post-office. Notice by publication is, at most, constructive notice; and, to be valid, every substantial requirement of the statute and the rule must be complied with.—1 Brick. Dig. 728, §§ 1300, 1301, 1302; *Curry v. Falkner*, 51 Ala. 564.

This decree *pro confesso* was afterwards set aside—the entry reciting, "parties consenting;" an amendment to the bill allowed, and defendants allowed thirty days within which to answer. There is no attempt, in the record, to show that notice of this amendment was served, or that notice was spread on the order-book. After the thirty days expired, the register entered another decree *pro confesso* against Holly, in the following terms: "It appearing to the register that an order of court was made on the 22d day of October, 1877, requiring the defendant Alfred Holly to appear, answer, demur to, or otherwise defend against the bill of complaint as amended in the above stated cause, within thirty days after passing said order, and the said defendant Alfred Holly has failed to appear within said time to answer, demur to, or otherwise defend against said bill of complaint as amended, for more than thirty days; on motion, it is ordered, that said bill of complaint as amended be taken as confessed against said defendant." It is contended for appellee, that the words, "parties consenting," bring the said Alfred Holly into court, and heal all imperfections in the original decree *pro confesso*. We think this would be according too much influence to the words, *parties consenting*. True, the word parties is plural, and denotes more than one. How many does it denote? The present suit has three parties—one complainant, and two defendants. One defendant, Ramer, was personally served, and was thereby brought actually into court. The other, Holly, was not served personally

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with process. Neither answered. If the complainant and any one of the defendants was present, and consented, this meets all the requirements of the words 'parties consenting.' We do not think this recital brought Mr. Holly before the court, or healed the irregular decree *pro confesso*. Not being before the court, the second decree *pro confesso* does not recite enough to conclude a non-resident defendant, as to whom only publication was made.—See *Williams v. Lewis*, 2 Stew. 41; *Lucy v. Beck*, 5 Por. 166; *Catlin v. Gilders*, 3 Ala. 536; *Puckett v. Pope*, *Ib.* 552; *Savage v. Walshe*, 26 Ala. 619; *Ex parte Lyon*, 60 Ala. 650; authorities collected in *Hunt v. Ellison*, 32 Ala. 185.

If the decree *pro confesso* against Holly had been regularly taken, he would then have been in default. This, however, would not have dispensed with the notice the rule requires.—Rule of Chancery Practice No. 47, subd. 3. Notice of some of the amendments was not given according to this rule, or in any other manner, so far as the record discloses. There was no necessity to give notice of the first amendment allowed by the register. That amendment was allowed under section 3788 of the Code of 1876.

Reversed and remanded.

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Bill in Equity by Creditors for Account and Settlement of Assignment in Trust by Insolvent Partnership.

1. *Where bill must be filed.*—When the defendants reside in this State, and the suit does not relate to real estate, nor seek to enjoin proceedings at law, a bill in chancery can only be filed in the district in which a material defendant resides.

2. *Same; how objection must be taken, if not filed in proper district.*—When a bill is filed in a chancery district which has not jurisdiction of the case, and the defect appears on the face of the bill, the objection may be taken by demurrer, or by motion to dismiss, if it has not been waived; but, when it does not so appear, a plea, in the nature of a plea in abatement, is proper.

3. *Same; when no court is held in proper district.*—A bill in equity can not be filed in Sumter county, against a resident citizen of Washington county, merely because no time may have been fixed by law for holding the court in the latter county.

APPEAL from the Chancery Court of Sumter.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 2d July, 1879, by Nelson A. Crawford, on behalf of himself and the other cred-

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itors of Patrick, Irwin & Co., against Robert M. Campbell; and sought an account and settlement of an assignment executed by said Patrick, Irwin & Co. to said Campbell, as trustee, for the benefit of their creditors. The defendant filed a plea, verified by affidavit, as follows: "Comes the defendant, and pleads, that the bill of complaint exhibited against him in this cause is not exhibited against him in the proper chancery district, and therefore this court has not, and ought not to entertain jurisdiction of the same; because he says that the same is filed in the district composed of the county of Sumter, in which said defendant does not reside, and did not reside at the time of filing the same; that the bill is not one to enjoin proceedings or judgments in other courts, or against a non-resident, nor respecting real estate in said county of Sumter; and that at the time of filing said bill, and for more than one year previous thereto, and till now, the residence of this defendant was in the county of Washington in said State. Wherefore he prays that he be not further held to answer said bill," &c. The chancellor sustained a demurrer to this plea, holding that it was defective both in form and substance; and his decree on the demurrer is now assigned as error.

T. B. WETMORE, for the appellant.

SNEDECOR & COCKRELL, *contra*.

BRICKELL, C. J.—The jurisdiction of a Court of Chancery depends, not only on the subject-matter, but, when the parties defendant reside in this State, and the suit does not relate to real estate, or to the injunction of proceedings in other courts, the residence of the defendants, or of a material defendant, is an element of jurisdiction. The statute is mandatory, that the bill must, except in the cases specified, be filed in the district in which the defendants, or a material defendant, resides.—Code of 1876, § 3760. A bill, disclosing on its face that it is not filed in the district of residence of a material defendant, would be subject to demurrer, or could be dismissed on motion, if there has not been a waiver of the objection.—*Shrader v. Walker*, 8 Ala. 244; *Porter v. Worthington*, 14 Ala. 584; *Lewis v. Elrod*, 38 Ala. 17; *Freeman v. McBroom*, 11 Ala. 943. When the objection does not appear on the face of the bill, or the bill avers the residence of the defendant in the district in which it is filed, a plea, in the nature of a plea in abatement, is an appropriate mode of presenting the objection, and asserting the defendant's ex-

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emption from suit in any other Court of Chancery, than that of the district of his residence.

The present bill was filed in the Court of Chancery of the county of Sumter, the fourth chancery district of the Western Division. The defendant, against whom it is filed, pleaded that, at and prior to the filing of the bill, his residence was not in that district, but in the county of Washington. The plea was overruled, it seems, rather on the ground, that the General Assembly had not prescribed a time for holding a Court of Chancery in the county of Washington, than upon any other which is urged in opposition to it. If this be true, which we do not feel called upon to decide, it is certain that the Court of Chancery of Sumter could not cure the omission, by drawing the citizens of Washington county within its jurisdiction, involving them in all the evils of suit elsewhere than the district of their residence, against which the statute intends to protect them. The General Assembly alone can supply the omission supposed, if it exists; and until there is some change of the statute, it is a privilege of a defendant in chancery, under the limitations expressed, to be sued in the county of his residence, of which he cannot be deprived, when it is asserted in proper time, and in an appropriate mode.

The decree overruling the plea must be reversed, and a decree here rendered sustaining the plea, and dismissing the bill, at the costs of the appellee in this court, and in the Court of Chancery.

Copeland & Brantley v. Cunningham.

Action on Attachment Bond.

1. *Attorney's fees as damages.*—In an action on an attachment bond, conditioned to “prosecute the attachment to effect, and pay the defendant all such damages as he may sustain from the wrongful or vexatious suing out of such attachment” (Code, § 3256), attorney’s fees for services rendered in bringing the action can not be recovered. (Overruling *Burton v. Smith*, 49 Ala. 293.)

2. *Demurrer to part of breach.*—In an action on a penal bond, assigning breaches, and specifying the damages which the plaintiff claims by reason of the breach, a demurrer “to that portion of the complaint which claims damages” which are not recoverable, is well taken.

3. *Bond with blank penalty; admissibility of parol evidence.*—An action cannot be maintained on an attachment bond, the penalty of which is left blank; nor can the defect be remedied by parol evidence as to what sum should have been specified.

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APPEAL from the Circuit Court of Pike.

Tried before the Hon. H. D. CLAYTON.

This action was brought by John Cunningham, against Copeland & Brantley as partners, to recover damages for the breach of an attachment bond, which the said Copeland & Brantley had executed in an attachment suit instituted by them against said Cunningham. The condition of the bond was, that said Copeland & Brantley "shall prosecute said attachment with effect, and pay the said defendant all such damages as he may sustain by the wrongful or vexatious suing out of said attachment." The bond was dated the 10th day of February, 1875, and the penalty was left blank, the officer by whom it was taken having neglected to insert any amount in the blank form. The complaint alleged, as a breach of this bond, "that said attachment was sued out both wrongfully and vexatiously, and was levied on the property of the plaintiff, to-wit, sixty bushels of corn, to plaintiff's damage one hundred and twenty dollars, wherefor he brings this suit; and plaintiff avers that, by the condition of said bond being broken, he has been damaged in a large amount—to-wit: the sum of twenty dollars, in loss of time; the sum of twenty-five dollars, loss and injury to his property; the sum of twenty-five dollars, attorney's fees in bringing this suit; and the sum of twenty-five dollars, costs in said attachment suit." Other breaches were assigned, claiming damages to plaintiff's credit and business, &c. The defendants "demurred in writing to the complaint, as follows: to that portion which claims counsel fees for bringing this suit, because they are not recoverable in this action, and because the damages for counsel fees in this suit are too remote to be recovered in this action;" which demurrer was overruled by the court. The record does not show what pleas were filed. On the trial, as the bill of exceptions shows, when the plaintiff offered the attachment bond in evidence, the defendant objected to its admission as evidence, "because there was no penalty fixed or specified in the bond, and because there was no approval of the bond by the officer authorized to take it." The court overruled the objections, and admitted the bond as evidence; and afterwards allowed the officer who issued the attachment to testify, "that he had authority to fill up the bond, and ought to have filled it up with the proper amount, which was double the amount sued for—that is, \$124.82." No objection was made to this testimony, but an exception was reserved to the admission of the bond; and several other exceptions were reserved to rulings of the court on evidence, and in the refusal of charges asked. The overruling of the demurrer to the complaint, the admis-

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sion of the bond as evidence, and the other rulings to which exceptions were reserved, eighteen in all, are now assigned as error.

PARKS & HUBBARD, for appellants, cited *Ferguson & Scott v. Baber*, 24 Ala. 402; 2 Greenl. Ev. § 456; Sedgwick on Damages, 99; 21 Pick. 378; 2 Metc. 229; 23 Wendell, 425; and *Cutter v. Roberts*, decided by the Supreme Court of Nebraska, and cited in Southern Law Journal, May, 1878, p. 269.

OATES & DENT, *contra*, cited *Burton v. Smith*, 49 Ala. 293; *Metcalf v. Young*, 43 Ala. 643; *Seay v. Greenwood*, 21 Ala. 491; *Wilson v. Cantrell*, 19 Ala. 642; *Williamson v. Woolf*, 37 Ala. 298.

STONE, J.—*Burton v. Smith*, 49 Ala. 293, was a suit on an attachment bond; and it was ruled in that case, that the plaintiff was entitled to recover reasonable attorney's fees for bringing the suit on the bond. No authorities holding the same doctrine were cited in support of the ruling. The condition, or defeasance of an attachment bond, is to "prosecute the attachment to effect, and pay the defendant all such damages as he may sustain from the wrongful or vexatious suing out of such attachment."—Code of 1876, § 3256. A suit on such bond is an ordinary suit on a contract, for its breach, and must be governed by the rules applicable to such ordinary suits. The condition of the bond does not provide for the payment of such attorney's fees; and we know of no principle of construction, by which contracts like this can be enlarged beyond their terms. It was the right and privilege of the defendants, appellants here, to pay the damages caused by the wrongful or vexatious suing out of the attachment, and thus prevent a suit. The present action was brought by Cunningham, in his own interest, and to recover moneys which he alleged were wrongfully withheld from him. We have no statute, or principle of law, which authorizes the recovery of attorney's fees in such an action as this. They are not damages proximately caused by suing out the attachment, and must stand on the same principles as other actions brought for breaches of covenants, or other executory contracts.—*Harbinson v. Harrell*, 19 Ala. 753; *Pounds v. Hamner*, 57 Ala. 342; *Garrett v. Yoe*, 17 Ala. 74; *Miller v. Garrett*, 35 Ala. 96; *Dunn v. Davis*, 37 Ala. 95. The demurrer to this assignment was rightly taken, and should have been sustained.—*Botts v. Bridges*, 4 Por. 274; *Taylor v. Pope*, VOL. LXIII.

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3 Ala. 190; *Wilson v. Cantrell*, 19 Ala. 642; *Governor v. Wiley*, 14 Ala. 172; *Williamson v. McArthur*, 37 Ala. 298; *Harmon v. Thompson*, 2 How. Miss. 808; *Martin v. Williams*, 13 Johns. 264; *McCay v. Shoots*, 2 Litt. 372; *Domsland v. Thompson*, 2 Blackst. (Sir Wm.) 910.

Other points will arise when this case returns to the court below for another trial. Among them, the fact that the bond is blank in its penalty. The present suit being on the bond, the plaintiff must recover on it, or not at all. He sues on an obligation or promise to pay blank dollars. If this be construed to mean 'dollars' in the plural—more than one—it is wholly indefinite as to the number, and we have nothing by which to determine the sum intended. If it be replied, that the defendants bound themselves to prosecute the action to effect, and to pay all such damages as the defendant might sustain from the wrongful or vexatious suing out of the attachment; the answer is, this is not the obligatory, but the defeasance part of the bond. It was the contingency, on which the obligors were not to pay money, which, but for the condition or defeasance, they had bound themselves by their contract to pay. Now, the contract declared on bound the bondsmen to pay no ascertained sum, and that promise was to be void, if they prosecuted their attachment to effect, &c. We hold, that the bond, which is the foundation of the suit, was a promise to pay nothing, and therefore that it could not be the foundation of a recovery. We will not say an action on the case could not have been maintained.—*McKellar v. Couch*, 34 Ala. 336. The defect in the bond could not be supplied by oral proof, in an action at law on the bond.—*Garrow v. Carpenter*, 1 Porter, 359; *Hamner v. Cobb*, 2 Stew. & Por. 383; Phil. Ev., Cow. & Hill's notes, 1st ed., 1471-3; *Ejner v. Shaw*, 2 Wend. 567; *Sessions v. Barfield*, 2 Bay, 94; *Mead v. Steger*, 5 Por. 498; *Sanford v. Howard*, 29 Ala. 684.

There are other questions, but some of them are not so presented as that we can consider them. The foregoing will furnish a guide for another trial. We overrule the case of *Burton v. Smith*, *supra*.

Reversed and remanded.

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Paulling's Adm'rs v. Creagh's Adm'rs.

Bill in Equity to Enjoin Sale under Mortgage; Cross-Bill for Foreclosure.

1. *Revivor under cross-bill.*—When a mortgagor files a bill to enjoin a sale of the mortgaged property under a power contained in the mortgage, and dies pending the suit; if the mortgagee wishes to obtain a decree of foreclosure, under a cross-bill and bill of revivor, as by statute he may do (Code, § 3805), he must take the necessary steps to bring in the personal representative and heirs (or devisees) of the deceased mortgagor, as defendants; and an appearance by the personal representative in the original suit, and the revivor of that suit in his name, are not sufficient to support a decree against him in the cross-suit, without any service of process upon him, or appearance by him in that suit.

2. *Decree against non-resident defendant.*—To support a decree against a non-resident defendant, on publication only, the statutes and rules of practice must be strictly observed, and the facts showing a compliance with them must appear by the record: a recital that publication was made in *due* form, or in *proper* form, is not sufficient.

3. *Same.*—When the affidavit of the defendant's non-residence states that his post-office is "*Goodwin*, Holmes county, Mississippi," and a copy of the order of publication is forwarded by mail to him at *Goodman* in said county, this is not sufficient to support a decree against him.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. CHARLES TURNER.

This case was before the court at two former terms, and may be found reported in 54 Ala. 646, where all the material facts of the case, as then presented, are stated. The opinion delivered by this court on the first appeal, at June term, 1871, seems never to have been reported. The record on the present appeal contains only the proceedings had in the cause since the last reversal. The facts were thus stated in the opinion of the court, as delivered by MANNING, J.:

"The administrators of A. M. Creagh, deceased, who was a large creditor of Wm. K. Paulling, being about to cause the sale of a valuable plantation, and numerous slaves engaged in cultivating it, that he had conveyed to a trustee to secure payment of the debt, or of so much of the mortgaged property as might be required to pay it; he, in January, 1857, filed a bill of complaint against them and the trustee, Mr. Lyon, to enjoin said sale; alleging therein a variety of frauds against him, in the settlement made when the notes for his indebtedment were given, and in procuring the securities about to be enforced. The suit was delayed from

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time to time, and two decrees, which were successively rendered in it, were, at different terms of this court, here reversed, and the cause remanded. When this was done the second time, in 1876, instructions were prescribed as to the manner in which the account should be stated, upon a reference to a master in the Chancery Court; and it being evident that a large balance would be due from Paulling, this court said in respect it: 'A decree should be rendered in favor of the administrators of Creagh, and a sale of such of the property embraced in the deed to Lyon [the trustee] as has not perished, should be ordered for its payment,' and the costs be taxed against Paulling.—54 Ala. 658.

"Not long after this, Paulling died, leaving a will, by which he devised and bequeathed all his property, then consisting mainly of real estate, to several persons who resided in the State of Mississippi. Appellant Bush was appointed administrator with the will annexed of Paulling's estate in Alabama, and in that capacity became a party complainant to the cause. But the devisees and heirs having declined or neglected to become parties to the same, the administrators of Creagh's estate, defendants thereto, by virtue of a statute in such case made and provided, filed a cross-bill and bill of revivor against them and Bush as administrator, to bring them in and make them parties, so that the litigation might be proceeded in, and a decree rendered as directed in the opinion here delivered. To this end, proceedings were thereupon had, an account was ordered, stated, and confirmed; and a decree was entered, that the mortgaged property be sold by the register, and the proceeds applied to payment of the debt which, according to his report, was due to Creagh's estate. To reverse this decree, the cause has been brought to this court by appeal. The errors assigned are, that the persons named as defendants in the cross-bill were not brought into court."

BRAGG & THORINGTON, for appellants.—1. It was error to order a decree of reference, or to render a final decree against John W. Bush, as administrator of W. K. Paulling, deceased, when the record shows that he had never been served with any process to appear and plead, answer, or demur to the cross-bill and bill of revivor, and never appeared, nor in any way consented to these orders and decrees. Code, §§ 3763, 3775, 3805, 3823; *Kirk v. McAllister*, 39 Ala. 343; 4 Peters, 466; 14 Peters, 147; 9 How. U. S. 336; 11 How. U. S. 437; 3 Sumner, 600; 2 Paine, 502; 2 McLean, 473, 511; 4 *Id.* 96.

2. The record shows that these decrees were rendered be-

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fore the lapse of eighteen months from the grant of administration to Bush. This was error.—Code, §§ 2614, 3274.

3. As against the non-resident defendants, the decree of reference, and the final decree, each, is erroneous. The affidavits disclosed their non-residence, their place of residence in Mississippi, and their post-office; and the decree *pro confesso* against them fails to show that any copy of the order of publication was ever mailed to them, or posted up at the courthouse door, as required by the 25th rule of practice.—*Hurter v. Robbins*, 21 Ala. 585; *Butler v. Butler*, 11 Ala. 668; *Cullom v. Branch Bank*, 23 Ala. 797; *Hartley v. Bloodgood*, 16 Ala. 233; *Batre v. Auze*, 5 Ala. 173; *Erwin v. Ferguson*, 5 Ala. 158; *Curry v. Falkner*, 51 Ala. 565; *Hanson v. Patterson*, 17 Ala. 738.

4. As against Sarah C. Jones and W. E. Noel, the court erred in appointing a guardian *ad litem* for them, and in reviving the suit in their names, and in the decree of reference, and in the final decree.—*Batre v. Auze*, 5 Ala. 173; *Erwin v. Ferguson*, 5 Ala. 158; *Walker v. Bank of Mobile*, 6 Ala. 452; *Dunning v. Stanton*, 9 Porter, 513; *Walker v. Hallett*, 1 Ala. 379.

W. M. BROOKS, and W. E. CLARKE, *contra*. (No brief on file.)

MANNING, J. [After stating the facts as above.]—On examining the record, we do not find that the summons, which (it seems) was issued, was ever served on Bush, the administrator; nor did he appear in the cause at all, as a defendant in the cross-suit. The fact that he made himself, as administrator, complainant in the suit brought by Paulling, was not sufficient. He should have been served with process to make him a party in fact to the cross-bill. It set forth a history of the transactions between the decedent, Creagh, and Paulling, and of the proceedings in the suit of the latter, which Bush was entitled to controvert; and it prayed for relief, such as the Chancery Court granted. The decree was rendered, also, on a hearing or submission of the original and cross-cause both together, and was rendered in accordance with the prayer of the cross-bill. It was error to make such a decree without having Bush served with process, and without any appearance on his part, in the cross-action.

There seems to have been a failure, also, to comply with the provisions of the law to bring the non-resident devisees and heirs of Paulling into court. According to statute, "orders of publication must conform to the rules now in force in Courts of Chancery in this State, and to those which may

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hereafter be made."—Code of 1876, § 3773 (3339). And by the 25th Rule of Chancery Practice, it is ordered, in respect to non-resident defendants, that the register shall have all orders of publication, "whether made by the chancellor or himself, published, with as little delay as may be, in such newspaper as may be designated in the order, once a week for four consecutive weeks; a copy of which order he must post up at the door of the courthouse of the county, or other place where the court sits, and shall send by mail another copy thereof to the defendant, where his residence is shown by the bill or affidavit, as aforesaid; which copies shall be posted up, and sent by mail, within twenty days from the making of said order."

Without going into any question made respecting the validity of the register's amendment *nunc pro tunc* of his original entries on this subject, it appears by them as amended, that the copies of the publication and notice were not sent to the post-office designated in the affidavit made thereof, as that of the defendants. According to the affidavit, the post-office of the parties was *Goodwin*, in Holmes county, Mississippi; but the copies were addressed to them at *Goodman*, instead of *Goodwin*. This was not a proper service.

"Notice to the defendant, actual or constructive," said the Supreme Court of the United States, "is an essential prerequisite to jurisdiction. Due process, with personal service, as a general rule, is sufficient in all cases." But constructive notice "can only be admitted in cases coming fairly within the provisions of the statute authorizing courts to make publication, and providing that the publication, when made, shall authorize the court to decide and decree." Wherefore it was held, that affixing process on the front door of the house which the defendant had lately occupied with his family as his home, and had left because the country in which it was situated in Virginia was brought within the power of the army of the United States during the late war, was not a compliance with the statute, which required such process to be "posted on the front door of the party's usual place of abode."—*Earle v. McVeigh*, 91 U. S. 507-8. See, also, *City of Opelika v. Daniel*, 59 Ala. 217-18.

Rules prescribed by law, through which jurisdiction is acquired to render judgments and decrees that shall be binding upon persons residing out of the State, and beyond the reach of its process, must be complied with, or the jurisdiction is not obtained. A final decree, rendered against a defendant as to whom publication was ordered, without proof that publication was perfected according to the order,

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will be reversed.—*Batre et al. v. Auze*, 5 Ala. 173; *Butler v. Butler*, 11 Ala. 668; *Hartley v. Bloodgood*, 16 Ala. 233; *Beavers v. Davis*, 19 Ala. 82.

The record must disclose that a copy of the order was posted at the court-house door, or the decree cannot be sustained.—*Cullum v. Branch Bank of Mobile*, and *Butler v. Butler*, *supra*. And if the residence of defendant is disclosed, it must appear that a copy of the order was transmitted to him by mail.—*Ib.* And these things must be shown by recitals of the facts; a mere statement, or recital, that publication was made in due or proper form, is not sufficient, when the case is brought up by appeal. This is the statement rather of a legal conclusion, than of facts.—*Hanson v. Patterson*, 17 Ala. 738; 1 Brick. Dig. 764. For the course to be pursued where non-resident infants are to be made parties defendants, see the rules on that subject, and 1 Brick. Dig. 762.

Let the decree of the chancellor be reversed, and the cause remanded.

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Action for Breach of Special Contract.

1. *Bankruptcy; composition with creditors; requisites of plea.*—A composition between a bankrupt and his creditors, when approved by the court, is binding and conclusive only on the creditors whose names and address, with the amount of their debts, are included in the statement furnished by the bankrupt to the creditors' meeting (Rev. Stat. U. S. § 5103); and when such composition is pleaded by the bankrupt, in bar of a subsequent action by a creditor, the plea must aver that the plaintiff's name, &c., were included in the defendant's statement.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

This action was brought by Wm. D. Graves, against Louis Goetter, David Weil, and Louis Shulman, who are described in the summons, but not in the complaint, as "late partners doing business in the name of Shulman, Goetter & Weil;" and was commenced on the 3d July, 1878. The summons and complaint were served on Goetter and Weil, and returned not found as to Shulman; but the action was treated as a suit against the partnership. The complaint contained only a single count, which was in these words: "The plaintiff claims of the defendant one thousand dollars, for that

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whereas, to-wit, on the 9th day of January, 1872, Henry H. Mead and W. J. Wilson were indebted to plaintiff in the sum of \$536.12, due by promissory note for said sum, dated May 1st, 1871, and due on the 1st October, 1871, with interest from the date thereof, payable to one H. W. Clayton; which note was previously thereto transferred to said plaintiff: and whereas, on, to-wit, said 9th January, 1872, the said H. H. Mead was indebted to defendants in a large sum, to-wit, in the sum of \$3,000, and was the owner of certain real and personal property situated in said county of Montgomery; he, the said Mead, proposed to *receive* [secure?] the said sum, so due to plaintiff, by mortgage upon said property; whereupon, defendants offered and promised to pay to plaintiff the said sum so due to him from said Mead, one half in cash, and the balance in the fall of 1872, if the said Mead would trade with defendants in the purchase of his supplies during the year 1872, and would execute a mortgage upon his property to secure the said sum so due to defendants, and the price of such supplies as he might purchase from defendants during the year 1872, and, for further security, would also execute a lien upon the crop of said Mead to be grown during the year 1872; and all of which was to be due and payable on the 1st day of October, 1872. And plaintiff avers, that said offer, so made by defendants, was accepted by said Mead and plaintiff; and the said Mead did, on said 9th January, 1872, execute the mortgage and lien upon the said crop for the security of the amount due from said Mead to defendants, and the price of goods and supplies to be bought as aforesaid during the year 1872; and thereupon defendants promised to pay to plaintiff the amount of said note, and did pay to plaintiff, to-wit, on the 3d day of February, 1872, three hundred dollars, and promised to pay the balance due upon said note in the fall of 1872; and although often requested to do so, the defendants have failed and refused to 'pay the same,' &c.

The defendants pleaded, "in short by consent: 1. The general issue. 2. The statute of limitations of three years. 3. The statute of limitations of six years. 4. The statute of frauds. 5. And defendants further say, that, before the commencement of this suit, they were adjudged bankrupts by the District Court of the United States at Montgomery; and afterwards, by the authority of said court, a composition was had with their creditors, which was duly approved by said court. 6. And defendants further plead, as a set-off, a note executed by plaintiff to defendants on the 27th November, 1873, for \$170.85, payable one day after date; which sum, with the interest thereon, is still due and unpaid."

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The plaintiff demurred to the 5th plea, "in short by consent," "because it does not appear from said plea that the name and address of plaintiff, and the amount of the debt due to him, was shown in the statement of defendant at the meeting of creditors passing the resolution of acceptance of said compromise." The court sustained the demurrer, and its judgment in that behalf is now assigned as error.

SAYRE & GRAVES, for appellants.—The statute provides for a composition with the bankrupt's creditors, under the direction of the court, and subject to its approval.—Rev. Stat. U. S. § 5103. The plea sets out such a composition, and avers that it was had under the authority of the court, and was approved by the court. The term *composition* is general, and includes every detail of fact necessary to make it effectual; and the word *creditors*, as used in the plea, must be construed to mean all creditors. The pleadings are "in short by consent," and the language must be construed liberally.—*Jackson v. Jackson*, 7 Ala. 791; *Amason v. Nash*, 24 Ala. 279; *Governor v. Bancroft*, 16 Ala. 605. That the name and address of plaintiff were not included in the statement submitted to the meeting of creditors, if such was the fact, was matter for a replication to the plea.

R. M. WILLIAMSON, and T. M. ARRINGTON, *contra*, cited Bump on Bankruptcy, 9th ed., 676; 12 Blackf. 562; 12 Bank. Reg. 201; 13 *Ib.* 455.

BRICKELL, C. J.—The act of Congress declares: "The provisions of a composition, accepted by such resolution, in pursuance of this section, shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors." A former clause renders it the duty of the bankrupt to produce to the meeting of creditors, at which the resolution of composition is adopted, "a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due; and it is further provided, that the resolution of composition, when approved by the court, shall be operative, if passed by a majority in number and three-fourths in value of the creditors assembled at such meeting, and confirmed by the signatures of the debtor and two-thirds in number and one-half in value of all the creditors.

A discharge in bankruptcy, granted by a court of compe-

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tent jurisdiction, like judgments and decrees operating in *personam*, cannot be collaterally impeached for mere defects or irregularities in the proceedings.—*Morrison v. Woolson*, 29 N. H. 510; *Lathrop v. Stuart*, 5 McLean, 167; *Richards v. Nixon*, 20 Penn. 19. The act of Congress makes the certificate conclusive evidence, in favor of the bankrupt, of the fact and regularity of the discharge. A discharge, obtained under the bankrupt law of 1841, could be impeached for fraud in any court before which it was pleaded.—*Mabry v. Herndon*, 8 Ala. 848. But, under the bankrupt law of 1867, the discharge could be impeached, for any cause which would have prevented it from being granted, only in the court in which the adjudication was had, and within two years after the date thereof.—*Oates v. Parrish*, 47 Ala. 157; *Milhouse v. Aicardi*, 51 Ala. 594.

The court in bankruptcy having acquired jurisdiction, resolutions and proceedings in composition may be pleaded in bar of the right of a creditor to maintain a suit on a demand within their operation. The regularity of the proceedings is as incapable of impeachment collaterally, as would have been a discharge granted by the court, if the discharge had not been rendered unnecessary and improper by the intervention of the composition.—*In re Becket*, 12 B. R. 241; *Smith v. Eagle*, 14 B. R. 241; Blumenstiel's Law and Practice in Bankruptcy, 461. The regularity of the proceedings may not be impeached, and may be unimpeachable: the mode of procedure pointed out may be strictly pursued; and yet there may be creditors on whom the proceedings do not operate—creditors not bound or affected by the composition, whose rights are preserved unimpaired, by the terms of the statute. As to such creditors, the jurisdiction of other courts is not affected. They are not required to resort to the bankrupt court, to annul or vacate the composition. If the composition is pleaded against them, the court will inquire whether they are of the class on whom it is binding, or whether they are of the class not affected by it. The inquiry will not be, whether the composition is tainted with fraud—whether the proceedings leading to it were regular: but, whether it is binding on the particular creditor. Such inquiry, like an inquiry as to the jurisdiction of a court rendering a judgment relied on as a bar, must be made by any court in which the composition is pleaded.—*Ex parte Paper Staining Co.*, 8 Ch. App. 595.

As a plea of discharge in bankruptcy must show the jurisdiction of the court granting it, a plea of composition should also show that it is binding on the party against whom it is pleaded. Binding only on creditors who were shown by the

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statement of the bankrupt, produced at the meeting of creditors passing the resolution of composition, the plea must aver that such statement included the name and debt of the plaintiff. This is as essential to the efficacy of the composition, as is jurisdiction to the efficacy of a discharge. Intendments are not made to support pleadings, when assailed by demurrer. The pleader is presumed to state the case as strongly for himself, as the facts will authorize. The omission to state a material fact justifies the court, in pronouncing judgment, in assuming the fact does not exist. The plea, not showing that plaintiff's claim was included in the statement produced to the meeting of creditors, did not show the composition was binding on him, and the demurrer to it was properly sustained.

The omission of the name and demand of a creditor from the schedules of a bankrupt, if inadvertent, is not ground for impeaching the discharge. If fraudulent, it may be ground for its vacation in the bankrupt court, but would not be available collaterally. The case is different with a composition, which the statute limits in operation to creditors whose names and addresses, and the amounts of whose debts, are shown in the statement produced by the bankrupt to the meeting of creditors accepting it.

Let the judgment be affirmed.

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Statutory Action in Nature of Ejectment.

1. *Bankruptcy; lien of attachment levied more than four months before.*—An adjudication of bankruptcy does not destroy or affect the lien of an attachment levied more than four months prior thereto: the debtor's title to the property passes to the assignee as he himself held it—that is, subject to the lien of the attachment; and the court in which the attachment suit is pending may, notwithstanding the bankruptcy, proceed with the suit, and enforce the lien by any appropriate process which does not involve a personal judgment against the bankrupt.

2. *Homestead exemption; allowance by District Court in bankruptcy, in lands subject to attachment lien.*—The allowance of a homestead exemption by the District Court in bankruptcy, in lands which, though included in the bankrupt's schedule, were subject to the lien of an attachment levied on them more than four months prior to the adjudication in bankruptcy, and which were afterwards sold under the judgment in the attachment suit, operates only on such claim and interest in the land as passed to the assignee, and can not prevail against a purchaser under the judgment in attachment.

3. *Same; how waived, or lost.*—When an attachment is levied on lands, the right to a homestead exemption in them must be claimed and asserted before

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the lands are sold under final process on the judgment in the attachment suit, or it is waived and lost.

4. *Same; occupancy.*—A homestead exemption can not be claimed in lands which are not in the actual occupancy of the debtor as a residence.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. LOUIS WYETH.

This action was brought by Thomas Lile, against James L. Martin, to recover the possession of a certain tract of land in said county, together with damages for its detention; and was commenced on the 1st August, 1877. The land had belonged to George W. Drake, and both parties claimed under him; the plaintiff, by purchase at sheriff's sale, under a writ of *venditioni exponas*, issued on a judgment in an attachment case against said Drake, and a subsequent deed from the assignee in bankruptcy of said Drake; and the defendant, under a conveyance from said Drake, who claimed it as his homestead exemption under an order of the District Court in bankruptcy allowing it to him. The material facts, affecting each of these titles, are stated in the opinion of the court. In the court below, the facts were agreed on, and reduced to writing; and the court, "being required to charge the jury on the effect of the evidence," instructed the jury that on the agreed facts, they must find for the plaintiff. This charge, to which the defendant excepted, is now assigned as error.

BRANDON & JONES, for the appellant, cited *Steele v. Moody*, 53 Ala. 418, and cases there referred to.

CABANISS & WARD, *contra*, cited *May v. Courtney, Tenant & Co.*, 47 Ala. 185; *Ray v. Norworthy*, 23 Wallace, 128; *Steele v. Moody*, 53 Ala. 423; *Bump on Bankruptcy*, 8th ed., 152, 510.

STONE, J.—Attachments against the property of Drake were levied on the lands in controversy, more than four months before he, Drake, was adjudicated a bankrupt on his own petition. The attachments were never dissolved, nor does it appear there was any ground for their dissolution. After Drake was adjudged a bankrupt, Bradley, his assignee, was substituted in his place as defendant in the attachment suits; and long after Drake's discharge in bankruptcy, judgments were recovered in said attachment suits, not against Drake personally, but ascertaining the amounts due, and condemning the lands to sale in payment thereof. Under orders of sale issued on said judgments, the sheriff sold the lands, and Lile, plaintiff in this action, became the purchaser, and received a deed from the sheriff. Drake interposed no claim of homestead exemption in the attachment suits and

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proceedings, and it does not appear that he ever was in the actual possession of the lands. He did not personally occupy them when the attachments were levied, or at any time afterwards. They were in the possession of his tenants, he residing in another county.

The defendant, appellant here, makes title as follows: When Drake filed his petition in bankruptcy, he rendered in the lands in controversy in his schedule of assets, and filed therewith his claim to have the said eighty acres set apart to him under the statutes of the State. It is not shown that, in such schedules and surrender, any mention was made of the attachments which had been levied on the land; and it is not shown that the plaintiffs in those attachment suits were brought before the court in bankruptcy, or had any notice that Drake had claimed, or would claim, a homestead exemption in the lands so resting under the lien of an attachment levy. The homestead exemption, so claimed by Drake, was allowed him by the District Court, sitting in bankruptcy. Drake conveyed to Martin, the defendant in this suit, who held possession by his tenant, when this suit was brought. Subsequent to Lile's purchase at sheriff's sale, Drake's assignee released to him, by quit-claim deed, all the interest which he, as assignee, held in said lands.

"The levy of an attachment creates a lien, in favor of the plaintiff, upon the estate of the defendant so levied on, from the levy."—Code of 1876, § 3280. True, this lien is not always effective. If the plaintiff fails to obtain a judgment in the suit in which the levy is made, the lien is lost. When, however, he does prosecute his suit, so commenced, to a judgment in his favor, the lien is preserved, and dates from the levy. The bankrupt law, speaking of the effect of the assignment by the register to the assignee, of the bankrupt's effects, declared, that "such assignment shall relate back to the commencement of the proceedings in bankruptcy, and, by operation of law, shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any attachment made within four months next preceding the commencement of the bankruptcy proceedings."—Rev. Stat. U. S. § 5044. Under this statute, the uniform ruling has been, that "no attachment, made prior to the period of four months next preceding the commencement of proceedings in bankruptcy, is dissolved. Not being dissolved, it remains in full force. When the attachment is so made prior to that time, the debtor's title to the property attached passes to the assignee, subject to the creditor's lien acquired by virtue of such attachment.

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The lien may be enforced by any requisite proceedings therefor, which do not involve a judgment *in personam*. A judgment only to be enforced against the property attached, but not to be enforced against the person of the defendant, or any other property, may be entered, even though a discharge has been granted, and is pleaded in bar of the action."—Bump on Bankruptcy, 9th ed., 507.

In *Crowe v. Reid*, 57 Ala. 281, we held, "The lien of an attachment, levied on real estate, more than four months prior to an adjudication in bankruptcy, and of executions issuing from the courts of the State, were not impaired or destroyed, but were preserved by the bankrupt law; that creditors could, after bankruptcy, enforce such liens through the medium of the process of the State courts having jurisdiction." After collating many decisions of the Supreme Court of the United States, bearing on the question, we said further, "There is not discoverable any suggestion countenancing the proposition, that an adjudication in bankruptcy strips other tribunals of jurisdiction already existing, and transfers to the court of bankruptcy exclusive jurisdiction of the estate of the bankrupt." And we decided that the lien in that case, which dated before the adjudication in bankruptcy, was not affected by such adjudication; and the title acquired under the lien, although acquired under proceedings in the State court, was allowed to prevail against any and all claim of the assignee.

These authorities conclusively show, that when Drake became a bankrupt, only such interest as he then held in the lands in controversy vested in his assignee. The interest he then held and owned, was only the residuum left, after satisfying the attachment lien, afterwards enforced against it. All else was in the custody of the State court, by virtue of the attachments levied more than four months before that time. The sale of the entire property under the attachment liens fell far short of paying the judgments recovered in those suits; and hence nothing of value in that land really passed to the assignee.

We hold, that the homestead claim of Mr. Drake, allowed by the court in bankruptcy, was valid against, and only valid against such claim as the assignee in bankruptcy had to the land. This, we have shown above, was nothing. This claim rests on section 2880, Revised Code. Under that statute, to assail the claim of Lile in the present suit, it was necessary to show that Drake had successfully interposed his claim of homestead *in the State court, and before the sale was made*. Homestead exemption is a mere privilege, which may be waived, and which is waived, if not claimed according to law.

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Moreover, Mr. Drake not residing on the land he claimed as homestead, his claim, if he had made one, should have been disallowed.—*Kaster v. McWilliams*, 41 Ala. 302; *Bell v. Davis*, 42 Ala. 460; *McConnaughy v. Baxter*, 55 Ala. 379; *Preiss v. Campbell*, 60 Ala. 635.

The judgment of the Circuit Court is affirmed.

Fore v. Hibbard.

Detinue for Furniture of Drug Store.

1. *Parol evidence; when admissible to show meaning of words in mortgage, or identify things conveyed.*—When a mortgage conveys “the following described real estate, with the buildings thereon known as the drug-store, and all the fixtures and furniture thereto pertaining, or in any wise belonging;” and it is shown to have been given, on the dissolution of a partnership between the mortgagor and mortgagee in carrying on a drug-store, to secure the payment of the agreed price for the mortgagee’s interest in the property and business; the word *furniture* being interlined before signature, on objection by the mortgagee to the use of the word *fixtures* alone; although oral evidence is not admissible to show what the parties agreed should be included in the word *furniture*, it should be received to identify the articles which did in fact constitute the furniture of the building, and were used by the parties in carrying on their said business therein.

APPEAL from the Circuit Court of Monroe.

Tried before the Hon. JOHN K. HENRY.

This action was brought by J. F. Fore, against B. L. Hibbard, to recover “three walnut show-cases, one walnut office-chair, one soda-fount, and syrup bottles and glasses belonging thereto,” and numerous other articles, together with damages for their detention; and was commenced on the 20th December, 1875. The defendant pleaded *non detinet*, and a special plea denying the plaintiff’s ownership of the articles sued for; and issue seems to have been joined on both of these pleas. The plaintiff claimed the articles under a mortgage executed to him by the defendant; and the principal question in the case was, whether they were included in the mortgage. The material facts were thus stated in the opinion of the court, as delivered by MANNING, J.:

“By the mortgage under which the question in this case arises, Hibbard, the defendant below, sold and conveyed to plaintiff, Fore, ‘the following described *real estate*, to-wit, lot No. 15, in the plan of the town of Monroeville,

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containing a half-acre, with the buildings thereon, known as the drug-store, and all the fixtures and furniture thereto pertaining, or in any wise belonging;’ and in a subsequent part of the instrument, the mortgagor says: ‘If I fail to pay said note, in part or in full, then the said J. F. Fore is hereby authorized to take possession of said land, fixtures, &c., above described.’ The parties had been partners in carrying on the business of druggists and grocers, in the building referred to; and the note mentioned, and mortgage, were given upon the purchase by Hibbard of Fore’s interest in the business and property of the partnership, in August, 1873. The words ‘furniture’ and ‘fixtures &c.’ where these latter subsequently occur, upon objection made to the terms of the mortgage, before its execution, were interlined by consent, before it was signed; and the things sued for are claimed as being of the ‘furniture’ (chiefly of the drug-store) mentioned in the mortgage.

“Plaintiff’s attorney proposed to prove, ‘that the word *furniture* was intended to cover the furniture used in carrying on the business of the drug-store and grocery,’ and to that end, he asked a witness (plaintiff himself) the following questions: ‘Was there any understanding between you and Hibbard, the mortgagor, as to what property was to be included and covered by the word *furniture*, previous to its execution?’ ‘What was the cause of the interlineation of that word?’ ‘What was then said as to the intention and meaning of the words interlined?’ ‘Why was the interlineation in the mortgage made?’ All of which questions were severally ruled out, against the objection and exceptions of plaintiff; and the judge, at the instance of defendant, told witness, ‘that he must not make any answer as to the meaning of the language of the mortgage, or which would vary the meaning of the words thereof; to which plaintiff excepted.’ Defendant, by cross-examination, proved that the show-cases, scales, jars, and other things sued for, were not attached or fastened to the realty; and plaintiff offered evidence, which was excluded, ‘tending to show that the articles sued for were properly termed *furniture* of a drug and grocery business.’ The judge, among other things, in his charge to the jury, told them, that the mortgage ‘did not convey such furniture or property as belonged or appertained to the drug or grocery business, as such, and not attached to or in any wise pertaining or belonging to the building: which also was excepted to. These several rulings are now assigned as error.”

J. W. POSEY, for the appellant, cited Halstead’s Law of

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Evidence, vol. 1, p. 210; *Doe v. Jackson*, 1 Sm. & Mar. 494; 16 Barbour, 89; 1 Greenl. Ev. §§ 277-8, 288-9; *Cowles v. Garrett*, 30 Ala. 347; *Taliaferro v. Brown*, 11 Ala. 706; *Hughes v. Wilkinson*, 35 Ala. 462; *Mobile M. D. Co. v. McMillan*, 27 Ala. 98; *Jenkins v. Cooper*, 50 Ala. 419.

J. M. WHITEHEAD, and C. J. TORREY, *contra*, cited *Thorpe v. Sughi*, 33 Ala. 330; *Barlow v. Lambert*, 28 Ala. 704; *Moody v. McCown*, 39 Ala. 586; and cases cited in Brickell's Digest, vol. 1, pp. 865-6, §§ 866, 867, 868, 870, 888, 898: *Ib.* 868, §§ 911-16.

MANNING, J. [After stating the facts as above.]—It is evident that the circuit judge acted under the conviction that nothing but real estate and fixtures thereof were conveyed by the mortgage; and that no unattached personal chattels could pass under the general description *furniture*, as contained in this mortgage. In this we think he erred.

It often happens that extrinsic circumstances are of value in elucidating the true meaning of a contract. "The court and jury, in interpreting what the writer meant, must put themselves, as far as evidence can enable them to do so, in his position," or, rather, in the position of the parties. 2 Whart. on Ev. 940, and authorities cited in note 2. Hence, it was properly shown in this case, by oral evidence, that Fore and Hibbard were partners in the drug and grocery business; that one had sold out his interest therein to the other; that the building which was on the lot mortgaged, was the house in which they were carrying on that business; and that after the mortgage had been written, it was amended by interlining the word "*furniture*," after *fixtures*, where this latter word first occurred, and the word and abbreviation, "*fixtures &c.*"; which shows that, without them, the instrument was considered defective.

Now, why was the word *furniture* added? If it was intended to mean, as the circuit judge seems to have understood, nothing more than the word "*fixtures*" imported, it is wholly superfluous. That was expressed already. And we do not usually understand realty, or things appurtenant thereto, as coming under the denomination of *furniture*. The word relates, ordinarily, to moveable personal chattels. It is very general both in meaning and application; and its meaning changes, so as to take the color of, or be in accord with, the subject to which it is applied. Thus, we hear of the furniture of a parlor, of a bed-chamber, of a kitchen, of shops of various kinds, of a ship, of a horse, of a plantation,

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&c. The articles, utensils, implements, used in these various connections, as also those used in a drug or other store, as the furniture thereof, differ in kinds according to the purposes which they are intended to subserve; yet, being put and employed in their several places as the equipment thereof, for ornament, or to promote comfort, or to facilitate the business therein done, and being kept, or intended to be kept, for those or some or one of those purposes, they pertain to such places respectively, and collectively constitute the *furniture* thereof.

It follows, that when any of the things, which together constitute the furniture of a place, are sued for in the action of detinue, the contract or writing, in which they are described by that general term only, will not, ordinarily, be sufficient evidence by itself to enable plaintiff to recover. The particulars must be shown, and identity proved by oral evidence; just as if a man, by his will, were to devise the quarter-section of land on which he was living, oral testimony must be introduced to identify the parcel. In such a case, as has been said before in this court, "It is the instrument which operates: the oral evidence does no more than assist its operation, by pointing out and connecting it with the proper subject-matter. . . . It points out the precise object to which the instrument is applicable."—*Paysant v. Ware*,

1 Ala. 165. And in another case, this court said: "Where a written contract, although complete in itself, contains a term which it is impossible for the court to construe without the aid of evidence *aliunde*, it is proper to resort to such evidence for that purpose."—*Cowles v. Garrett's Adm'r*, 30 Ala. 341.

The plaintiff should have been permitted to prove, not what the parties orally agreed should be included in the word furniture, but the things that did in fact constitute the furniture of the building mortgaged, in the use to which it was put of a drug and grocery store.

Let the judgment of the Circuit Court be reversed, and the cause be remanded.

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Phillips v. Ash's Heirs and Adm'rs.*Bill in Equity by Judgment Creditor to Enforce Lien of Attachment on Lands against Heirs.*

1 *Levy of attachment on lands; death of defendant before judgment.*—When an attachment is levied on lands, and the defendant dies before judgment, the lien created by the levy is thereby destroyed; and though the action may be revived, and prosecuted to judgment against his personal representative, the lien is gone, and the revivor does not affect the rights of heirs or devisees.

2. *Same; lien not enforced in equity.*—The plaintiff cannot, in such case, by bill in equity subject the lands to the satisfaction of his debt, since a court of equity can not aid or supply the defects of a statutory remedy. (The case of *McClellan v. Lipscomb*, 56 Ala. 255, was not intended to intimate that such a bill could be maintained.)

APPEAL from the Chancery Court of St. Clair.

Heard before the Hon. H. C. SPEAKE.

The bill in this case was filed on the 6th May, 1878, by Jackson Phillips, against the widow (personally and as administratrix) and children of William M. Ash, deceased; and sought to subject a tract of land, which had belonged to said William M. Ash in his life-time, and on which an attachment had been levied at the suit of the complainant, to the satisfaction of the judgment in the attachment case, which had been rendered against the widow as administratrix of said Ash. The attachment suit was commenced in April, 1864, and the attachment was levied on the lands, and also on several slaves, on the 22d April, 1864. The defendant in attachment died in 1865, and letters of administration on his estate were duly granted to his widow on the 29th October of that year. At the September term, 1866, of the Circuit Court of said county, in which the suit was pending, the death of the defendant in attachment was suggested, and a *scire facias* was ordered to issue to his administratrix; and the cause was revived against her at the next term. At the October term, 1868, judgment was rendered for the plaintiff, on issue joined; and the following order was added to the judgment: "And it further appearing to the satisfaction of the court that this suit was commenced by original attachment, and that the same was levied, in the life-time of the deceased, on lands and negro slaves, the property of said defendant; it is therefore now ordered, that the lands so levied upon be condemned to the satisfaction of this judg-

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ment," particularly describing them; "and it is further ordered, that a *venditioni exponas* issue out of this court, commanding the sheriff of said county to sell said lands or property, for the purpose of satisfying said judgment, in manner and form as the law in such case directs." The lands were sold under a *venditioni exponas* issued on this judgment, and were bid off by the plaintiff at the price of \$100. The bill alleged, that the decedent's estate had never been reported or declared insolvent, and that the lands were not worth more than the amount due on the plaintiff's judgment; and the complainant insisted, that his inchoate lien on the lands, acquired by the levy of the attachment, was perfected and made absolute by the judgment in his favor, but he had no title which could be asserted at law; and he therefore prayed that the lands might be sold, as in proceedings to foreclose a mortgage, and the proceeds of sale be applied to the satisfaction of his judgment, and also for general relief.

The defendants demurred to the bill, assigning the following (with other) causes of demurrer: 1st, "because complainant has no lien on the lands in controversy, on which to found the relief prayed;" 2d, "because whatever rights complainant had or has, under said attachment suit, are statutory, and this court will remit him to his statutory remedy for their enforcement;" 3d, "because complainant has a plain, adequate, and complete remedy at law." The chancellor sustained the demurrer on these grounds, and dismissed the bill; and his decree is now assigned as error.

J. W. INZER, and L. F. BOX, for appellant.

TAUL BRADFORD, *contra*. (No briefs on file.)

BRICKELL, C. J.—An attachment, as the leading process in the commencement of an action at law, which is executed by a levy upon the estate, real or personal, of the debtor, is unknown to the common law, derived here wholly from statutes. Its purpose is, that the jurisdiction of the court, in ulterior proceedings, may be more effectual, and to afford the plaintiff security for the satisfaction of the judgment which he may obtain. The levy, from its date, creates a lien—a right to charge the property levied upon, with the payment of the judgment rendered, in priority of any subsequent alienations the defendant may make, or of any subsequent incumbrances he may create, or of subsequent liens arising by operation of law, in favor of other creditors. The lien differs from the lien of an execution, as it now exists, or

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the lien of a judgment on lands, as it formerly existed. It operates only on the particular property which is the subject of the levy, and is incipient, inchoate, and conditional. It begins with the levy, and depends upon the condition, that the plaintiff in the suit obtains judgment, upon which process may issue authorizing a sale of the property attached. The lien terminates, if such judgment is not obtained. In its very nature, the lien is, consequently, less stringent, frailer, and more uncertain, than the lien of an execution. *Fitzpatrick v. Edgar*, 5 Ala. 499; *Hale v. Cummings*, 3 Ala. 398; *Lamar v. Gunter*, 39 Ala. 324; *McEachin v. Reed*, 40 Ala. 410.

Personal property, subject to execution, may be attached; and the officer must take it into possession, retaining the custody thereof, unless it is replevied in the mode prescribed by the statute. The levy displaces the possession of the defendant, and clothes the officer with a special property.

Woolfalk v. Ingraham, 53 Ala. 11. A levy may be made on real estate, whether the same be a fee-simple, or any less legal estate.—Code of 1876, § 3268. The effect of a levy on real estate differs materially from a levy on personal property. No estate, or interest, passes to the officer, or to the plaintiff; no right to the possession, or to take the rents, issues, or profits. The possession, and right of possession, remain in the defendant, undisturbed. A lien is created by the levy, superior to subsequent liens, alienations, or incumbrances, which will be available to the creditor, if he obtains judgment, to which the real estate can be made subject by process issuing upon it.—Drake on Attachment, § 239.

All personal actions, which may be commenced by attachment, or in the course of which an ancillary attachment may issue (except actions for injuries to the person or reputation), survive for and against the personal representatives of the respective parties.—Code of 1876, § 2921. The death of the defendant, after the levy of the attachment, causes a temporary suspension, or abatement of the suit, which must be cured by a revivor against his personal representative. The title to all personal property of a deceased person devolves, by operation of law, on his personal representative. Death works a change of the parties to the suit, but, of itself, does not dissolve the attachment, or impair its lien on personal property. For, when the revivor is had against the personal representative, there is before the court the party having the title; and if judgment is rendered against him, it operates directly on the property; and a *venditioni exponas*, or a *fierti facias*, may be issued upon it, under which a sale may be made for the satisfaction of the judgment. But, if the

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estate of the defendant has been judicially declared insolvent, then the lien is lost. The judicial ascertainment of the insolvency takes away all right to execution on the judgment, and transfers to the court ascertaining it exclusive jurisdiction to marshal and distribute the assets, and of all debts and claims chargeable upon them; and the statute intervenes, and declares the order in which debts and claims are to be paid.—*Woolfolk v. Ingraham, supra.*

But the death of the defendant, *pendente lite*, of necessity works a loss of the lien created by the levy of the attachment on real estate. If he dies intestate, the lands descend immediately to his heirs; or, if he dies testate, they pass to his devisees. The personal representative takes no estate or interest in them, and a judgment against him will not bind them. No other than real actions, under our statutes, are capable of revivor for or against heirs or devisees. As the title resides in them, and they cannot be made parties, no judgment can be rendered by which they are to be divested of their estate, though the levy created a lien, continuing during the life of the ancestor. This is the frailty and uncertainty of the lien, as the statutes have created it.—*McClellan v. Lipscomb*, 56 Ala. 255.

The history and changes of our legislation indicate, very clearly, a fixed purpose to prevent lands descended, or devised, from being subjected to sale under legal process issuing on a judgment against the personal representative. Lands were not, at common law, liable to the payment of debts; but it is not probable this doctrine of the common law ever obtained in this State. It is certain that, at a very early period in our legislative history, it was abrogated, and lands were made subject to judgments of courts of record, against the party having a beneficial legal estate in them.—*Nelson v. McCrary*, 60 Ala. 301. A judgment, at common law, against the personal representative, could not, of course, operate on lands, for he had no estate in them; and we are not aware of any English statute, which gave any remedy for subjecting them to the satisfaction of such judgment, which could ever have been considered of force in this State. The statute of Westminster 2, 13 Edw. 1st, authorized a *scire facias* against the heir, on a judgment rendered against the ancestor while living, but not on a judgment against the personal representative. In this respect, this statute was never regarded of force in this State (*Bell v. Robinson*, 1 Stew. 193); and if it had been, it would have been superseded by the act of 1828, which gave a judgment creditor a *scire facias*, to subject lands descended, if the personal representative neglected to apply to the Orphans' Court for an order to sell

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them for the payment of debts.—Clay's Dig. 197, § 27. This statute was construed as applying, not only in case of judgment against the ancestor, but likewise to judgments against the personal representatives.—*Fitzpatrick v. Edgar*, 5 Ala. 498. But it did not extend to lands devised—these could be subjected to the payment of debts, only in the mode prescribed by the statutes; that was, through the medium of the Orphans' Court, as it was then known.—*Ogden v. Smith*, 14 Ala. 428.

There was no re-enactment of this statute by the Code; and the effect and operation of section ten was, to repeal it. Not only was it repealed, but it is expressly enacted, that no execution can be issued against the personal representative on a judgment against the decedent, except in the particular case provided for by section 3213 (2875), in which there may be an existing lien by execution at the death of the defendant; and it is further declared, that the judgment shall not be revived against the personal representative except by suit thereon.—Code of 1876, § 2633. By these enactments, there is a clear expression of a legislative intention, that lands shall not be subjected to sale under a judgment against the personal representative.

But, it is urged that, while this may be true at law, as a lien was acquired by the levy of the attachment, and there is a want of legal remedies to enforce it, a court of equity will interfere, as it interferes when there is a clear legal right, and a want of adequate legal remedies to make it available. We do not understand that a court of equity intervenes to remove impediments which result from statutes to the enforcement of rights they create. If, in such case, the court interfered, it would give a higher and better right than the statute created—a right not existing at law, and a benefit the law does not confer.—*Neate v. Duke of Marlborough*, 3 M. & C. 407. An attachment is a special statutory remedy—it is in derogation of the common law; and in resorting to it, and deriving rights from it, the statutes must be pursued. If, from any cause, the remedy it affords is not full and complete, a court of equity cannot cure the deficiency.—*McPherson v. Snowden*, 19 Md. 233. The jurisdiction of that court is as well and carefully defined as that of courts of law. Neither can take up a statutory remedy, where the statute leaves it, and enlarge it, or extend it to cases for which the statute has not provided.—*Janney v. Buell*, 55 Ala. 408. It was long ago said by Lord TALBOT, and the remark has been often quoted and approved in this court, that "there are instances, indeed, in which a court of equity gives a remedy, where the law gives none; but, where a particular remedy is

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given by law, and that remedy is bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows."—1 Story's Equity, § 61.

But there is not, in fact, any want of adequate remedies for the creditor to reach lands descended, or devised, and subject them to the payment of his demand, whether it be by judgment against the ancestor, or against the personal representative, or a mere simple contract. The Court of Probate has full jurisdiction to order a sale of the lands for the payment of debts, on the application of the personal representative. If the personal representative fails to make the application, to the prejudice of creditors, it would be good cause for his removal. There can be no substantial reason for the preservation of the lien of the attachment; or for affording any other remedy to creditors to subject lands descended or devised. It was not intended by the queries suggested in *McClellan v. Lipscomb*, *supra*, to intimate an opinion that the lien of an attachment would survive the death of the defendant; or that a court of equity, in that event, could take it up and enforce it. The death of the defendant, pending the attachment, dissolved and removed the lien on the land, and a court of equity is without jurisdiction to restore it.

The decree is affirmed.

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Bill in Equity by Surety against Creditor, for Injunction, and Cancellation of Mortgage.

1. *Contract of suretyship; good faith required.*—The contract of a surety imports entire good faith between him and the creditor, which must be kept inviolate in all subsequent dealings between the creditor and the principal debtor: but the term is relative, and in determining whether it has been exercised the particular facts of each case must be considered.

2. *What will discharge surety.*—As a general rule, if the creditor does any act injurious to the surety, or inconsistent with his rights, or omits, when required by the surety, to do any act which duty enjoins on him, and the surety is thereby injured; in all such cases, the surety is discharged.

3. *Same.*—Any alteration in the terms of the contract, without the assent of the surety, such as an extension of the day of payment, though but for a single day, discharges the surety. But gratuitous indulgence on the part of the creditor, or mere passiveness or delay in enforcing his legal rights against the principal, when the duty of active diligence is not devolved on him by the demand of the surety, does not affect the liability of the latter.

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4. *Same.*—The surety is entitled to the benefit of all securities which the creditor may hold or acquire against the principal for the payment of the debt, and the creditor is bound to exercise reasonable diligence in the preservation and prosecution of such securities; and if they are lost by his negligence, the surety is, to that extent, discharged.

5. *Same.*—If the principal tenders payment of the debt in full, after its maturity, and the creditor declines to accept it, the surety is thereby discharged, though he may not have been injured; but the non-acceptance of an offer of payment by the principal, not amounting to a formal tender, is mere gratuitous indulgence, and does not affect the liability of the surety, unless he was thereby injured or prejudiced,—as where the principal was insolvent at the time of the offer.

6. *Same.*—If the creditor has in his hands moneys of the principal which he may rightfully retain, and voluntarily surrenders them to the principal, whom he knows to be insolvent, he is guilty of bad faith to the surety, and the latter is discharged to the extent of such moneys.

7. *Same.*—Where a life-insurance company, holding the note of a deceased policy-holder, for money loaned, and knowing that his estate was insolvent, paid the money due on the policy to his personal representative, to whom it was payable by the terms of the policy, although the latter offered to deduct the amount due on the note, or to receive the note in part payment; *held*, that the surety on the note was thereby discharged.

8. *Mortgage; how affected by discharge of debt.*—A mortgage is but an incident of the debt which it was given to secure, and is extinguished when the debt is paid or discharged; but, where a principal and his surety join in a mortgage of lands, which the surety has sold to his principal, executing to him a bond for titles on payment of the purchase-money, and the debt is discharged, as to the surety, by the laches or conduct of the creditor, although the mortgage is extinguished as to the surety, it remains a valid security on the principal's equitable interest in the lands.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE.

The bill in this case was filed on the 20th May, 1879, by James T. Neville, as the personal representative of Worley White, deceased, against the Life Association of America, a corporation chartered under the laws of Missouri; and sought to enjoin a sale of lands under a power contained in a mortgage, and to have the mortgage cancelled and annulled, on the ground that the defendant was only a surety on the note which it was given to secure, and was discharged from liability on the note under the facts stated in the bill. The mortgage was executed by said Worley White, complainant's intestate, and one Mike White, since deceased; was dated the 26th September, 1874, and given to secure the payment of a promissory note for \$1,200, of even date with the mortgage, signed by said Worley White and Mike White, and payable twelve months after date; and conveyed certain lands, of which Mike White was in possession, and which he had purchased from said Worley White, who had executed to him a bond conditioned to make title when the purchase-money was paid. The bill alleged that this note was given for money borrowed by Mike White from the defendant, and that Worley White signed it only as surety for Mike White.

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On the 21st September, 1874, Mike White insured his life in the said Life Association of America, for the sum of \$10,000; and in the year 1878, prior to the 25th May, he departed this life, whereby, as the bill alleged, "the said defendant became, by the terms of said policy, or contract of insurance, liable to pay to the legal representatives of said Mike White the said sum of \$10,000;" and in discharge of this indebtedness, on the 25th May, 1878, the defendant paid to the widow of said White, who had duly qualified as the administratrix of his estate, the sum of \$7,500. The bill alleged that, at the time this money was paid, the defendant still held the said note of Mike White and Worley White, and knew that Worley White had signed it only as surety for Mike White; that Mike White's estate was insolvent, and was so known to be by the defendant; that the administratrix "was willing to settle the said note, and receive the same as a part of the amount paid by said defendant, and her attorney proposed thus to settle the said note, secured by mortgage as aforesaid, as a part of the money paid on said policy of insurance; but, for some unaccountable reason, the said defendant declined and refused to surrender said note as cash on said settlement, and paid the money, and retained the said note." The complainant insisted in his bill "that it was the plain duty of said defendant, as a matter of justice and equity to the estate of said Worley White, and for the protection of his estate and property from being sold to pay the debt of an insolvent estate, that the said defendant should have cancelled the said note in the payment of said sum of money to said administratrix," and should have presented the note as a set-off against the debt due on the policy, and "should have exercised the right of stoppage" as to the amount due on the note; and that the estate of his intestate was discharged by the failure of the defendant to do these things. The bill prayed a perpetual injunction of the sale under the mortgage, the cancellation of the note and mortgage, and general relief.

The chancellor sustained a demurrer to the bill, for want of equity, and dismissed it, citing the following authorities: Brandt on Suretyship, 503, § 374; *Glazier v. Douglass*, 32 Conn. 393; *Perrine v. Firemen's Insurance Co.*, 22 Ala. 575; and *Clark v. Sickler*, 64 N. Y. 231. The chancellor's decree is now assigned as error.

D. P. LEWIS, for appellant.—1. The bill contains equity. If a lien was necessary, on the part of defendant, to entitle the surety to claim the debt as paid, the facts show a lien—that is, a right to retain the amount due on the note out of

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the insurance money, in two ways: 1st, by the expressed wish and agreement of the administratrix; 2d, by operation of law, on account of the insolvency of the deceased debtor's estate. The refusal of Mrs. White's proposal and offer was a rejected tender, so far as the surety was concerned; and no further act was necessary to make it effectual, as an offer to pay the mortgage debt.—*Rudolph v. Wagner*, 36 Ala. 698. The tender and refusal of the mortgage debt extinguishes the interest of the mortgagee in the property conveyed, and renders void a subsequent sale under the power in the mortgage.—*Jackson v. Crafts*, 18 Johns. 110; *Kortright v. Cady*, 21 N. Y. 343; *Edwards v. Insurance Co.*, 21 Wendell, 46; *Coggs v. Bernard*, 2 Ld. Raymond, 909; *Johnson v. Zink*, 51 N. Y. 333; Comyn's Dig., *Mortgage*, A. Although such offer may not operate as a payment, so far as the principal is concerned, its refusal discharges the surety, and operates as a new loan to the principal alone.—*McQuesten v. Noyes*, 6 N. H. 19; *Johnson v. James*, 10 Cush. 503; *Johnson v. Ivey*, 4 Coldw. Tenn. 608; 3 Indiana, 31; 46 Vermont, 258; 25 Mich. 503. The proposal of the administratrix was, that the defendant should "retain possession" of so much of the insurance money as would pay the mortgage debt; and this gave the defendant a lien.—33 Ala. 534; 18 Ala. 552; 14 Ala. 702; 2 Brickell's Digest, 213, §§ 1, 22. Independent of this proposal, the defendant had a lien by operation of law, growing out of the mutual indebtedness existing between it and Mike White's estate, and the known insolvency of that estate.—*Perrine v. Insurance Co.*, 22 Ala. 575; 1 Atk. 228; *Railroad Co. v. Rhodes*, 8 Ala. 206-13; 2 Vermont, 428; 8 Taunton, 499; *Lanesboro v. Jones*, 1 P. Wms. 325; *Jeff v. Wood*, 2 P. Wms. 128; 5 Vesey, 108; 11 Vesey, 24; 13 Vesey, 180; 19 Vesey, 465; *Rawson v. Samuel*, 1 Cr. & Ph. 161; *Samson v. Hart*, 14 Johns. 63.

2. The facts alleged bring the case within the general principle, that a person who has two funds, from which he may satisfy his demand, shall not, by his capricious election, disappoint another, who can resort to but one of those funds, but will be required to exhaust the separate fund, before resorting to the common fund.—*White & Tudor's Leading Cases in Equity*, vol. 2, pp. 259-60; 19 Ala. 126; 1 Story's Equity, §§ 588, 613; 1 Hopkins Ch. 460; 7 Johns. Ch. 184; 10 N. Y. 178; *Coker v. Shropshire*, 59 Ala. 542; 2 Barbour's Ch. 109; 12 Barbour, 578; 2 E. C. Greene, 496.

3. The chancellor erred, also, in dismissing the bill absolutely, without giving the complainant an opportunity to amend.—1 Daniell's Ch. Pr. 598, ed. 1871; 2 Phill. Ch. 545;

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4 My. & Cr. 554; 2 My. & Cr. 111; *Calhoun v. Powell*, 42 Ala. 647.

WALKER & SHELBY, *contra*.—The defendant had no lien on the policy, and it does not appear that there was any connection whatever between the loan of money, in which the note and mortgage originated, and the contract of insurance. What, then, has the defendant done, to discharge the surety? A careful examination of the facts, as alleged in the bill, shows that the defendant has merely indulged the principal debtor—that it failed to collect the note, when it could have collected it; that, having no notice to be active, it was passive. Mere passiveness on the part of the creditor, or delay, in the absence of any notice or request by the surety to proceed to enforce his legal remedies, does not discharge the surety.—*Summerhill v. Tapp*, 52 Ala. 227. “Having the means of satisfaction in his hands,” this court said, “does not signify that, whenever a creditor happens to come into actual possession of money or property of the principal debtor, whose debt is past due, he must seize and retain it; and that, if he does not do so, he will lose his remedy against the surety”: “it signifies money or property of the principal debtor, which he may rightfully retain, and appropriate to the satisfaction of his debt, without violating any duty, or subjecting himself to an action; in other words, there must be a lien in his favor on the property in his hands, conferred either by law or the owner, which is defined to be a right of retainer.”—*Perrine v. Firemen's Insurance Co.*, 22 Ala. 576. To the same effect, see *Brandt on Suretyship*, § 574; *Glazier v. Douglass*, 32 Conn. 393.

2. A proposal to pay, without more, is not a legal tender. *Camp v. Simon*, 34 Ala. 126; *McGehee v. Gewin*, 25 Ala. 186. A mere offer to pay by the principal debtor, and an omission so to do because of a request by the creditor to retain the money, and the subsequent insolvency of the principal, do not discharge the surety.—*Clark v. Sickler*, 64 N. Y. 231.

3. The chancellor thought the bill was not amendable, and therefore dismissed it absolutely. There was no offer to amend.—*Bishop v. Wood*, 59 Ala. 258.

BRICKELL, C. J.—The contract of suretyship differs materially from that of a guarantor, bound by a separate, distinct contract from that of the principal, founded usually on another consideration, entitled to notice of the default of the principal, and not chargeable with non-performance until such notice is given. Arising from joining in the making of a promissory note, joint and several in its terms, not nego-

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liable, the consideration moving only to the principal, it was defined in *Evans v. Keeland*, 9 Ala. 46, as "a contract whereby one person engages to be answerable for the debt, default, or miscarriage of another. It is an obligation accessorial to that of the principal debtor: the debt is due from the principal, and the surety is merely a guarantor for its payment."

The contract of a surety imports, it is said by Judge Story, entire good faith and confidence between the parties, in regard to the whole transaction. The creditor, being informed of the relation, is bound to the duty of disclosure of all facts and circumstances, which are calculated to affect materially the discretion of the surety, or the degree of his responsibility.—*Railton v. Matthews*, 10 C. & F. 934; *Hamilton v. Watson*, 12 *Ib.* 109; *Owen v. Homan*, 3 Mac. & G. 378; *Pidcock v. Bishop*, 5 Dow. & Ry. 505. The good faith, which must be observed in the making of the contract, must be kept inviolate in all subsequent transactions between the creditor and principal. The proposition is thus stated in a general form: "If a creditor does any act injurious to the surety, or inconsistent with his rights; or, if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases, the latter will be discharged."—1 Story's Eq. § 324-5.

We have numerous decisions, in which these general principles have been applied, and especially directed to a consideration of acts or omissions of the creditor, subsequent to the making of the contract, which have been relied upon as relieving the surety from liability. Any alteration of the contract, without the consent of the surety, *as to him* extinguishes its obligation. It ceases to be the contract into which he entered; and though the alteration may not work injury to him, he is discharged, because he has not given assent to the new contract, and the original contract, to which assent was given, has been displaced and extinguished. *Comegys v. Booth*, 3 Stew. 14; *Pyke v. Searcy*, 4 Porter, 52; *McKay v. Dodge*, 5 Ala. 388. The time of performing the contract, the day of payment, may be extended, by some subsequent arrangement between the creditor and the principal, to which the surety does not consent. If there is such an agreement, the surety is discharged, because the burdens of the contract are enlarged; there is, practically, a change of the original contract—the creditor places himself in a position, in which he cannot, on notice from the surety, proceed to sue on the contract, or respond to the decree of a court of equity, the surety has a right to obtain, compelling him to sue the principal. Here, again, the in-

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quiry is not, whether practically any injury has resulted to the surety. It is enough that the arrangement has been entered into without his consent; and from all such transactions good faith to the surety compels the creditor to abstain.

Mere gratuitous indulgence of the principal, whether extended at his request, or without it yielded by the creditor from sympathy, from an inclination to favor him, or the result of mere passiveness, will not operate to discharge the surety. There must be an agreement, founded on a valuable consideration; for, as we have said, there is practically a change of the original contract—a new contract, into which the surety has not entered. The length of the time of indulgence, or extension, is not material. The creditor cannot, for a day, or an hour, by an agreement to which the surety does not yield assent, tie up his hands, so that the surety would be deprived of the right to proceed instantly against the principal, on the payment of the debt; nor hold him to the agreement made alone with the principal.—2 Brick. Dig. 385, §§ 160–165. The main proposition, on which the chancellor rendered the decree now assailed, and which is now advanced to support it, is affirmed in numerous authorities, and its correctness has not been, and cannot be questioned. That proposition may be thus stated: Mere passiveness, or mere delay in suing the principal debtor, or in the prosecution of execution against him after judgment, will not discharge the surety. The duty of active diligence in the prosecution of suits, or of execution against the principal, can be devolved on the creditor by the surety, if he desired, by requesting it. But, if he is himself passive—if he does not, by preferring the request, quicken the creditor into activity, there is no room for, or justice in his complaint, of the inaction of the creditor, which his own may have induced.

There are circumstances, however, in which the creditor cannot be inactive, without being unjust, and wanting in good faith to the surety. In all such cases, it must be supposed that he intends to discharge the surety; or, if that intention cannot be presumed, his inaction, to which the surety does not assent, operates as a discharge of the latter, in courts of law, or of equity. An undisputed equity of the surety is, on payment of the debt, to stand in the place of the creditor, as to all securities which the creditor may hold, or acquire, for the payment of the debt; and he is entitled to all the benefit from them, which the creditor could have derived.—*Cullum v. Emanuel*, 1 Ala. 23; *Foster v. Athenæum*, 3 Ala. 302; *Ohio Life Ins. & Trust Co. v. Ledyard*, 8 Ala. 866; *Fawcetts v. Kinney*, 33 Ala. 261; *Lyon v. Leavitt*, 3 Ala. 430; *Knighton v. Curry*, MSS. It follows, that the creditor is

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bound to exercise reasonable diligence in the preservation of such securities; and if, by his negligence, they are lost, or, if he should disable himself from surrendering them to the surety, on payment of the debt, the surety is discharged, to the extent to which the securities, if made available, would have extinguished his liability.—*Cullum v. Emanuel*, *supra*; *Hayes v. Ward*, 4 Johns. Ch. 123; *Commonwealth v. Miller*, 8 Serg. & R. 452; *Everley v. Rice*, 20 Penn. St. 297; *Baker v. Briggs*, 8 Pick. 122.

The principles defining, in particular circumstances, the good faith which the creditor must observe towards the surety, aid materially in determining what are his duties under other circumstances, in which he may have the means of obtaining payment from the principal. *Good faith* is not a mere absolute, inflexible phrase, existing of and by itself. It is a *relative term*, and must always be considered in reference to the relation of the parties—the confidence existing, or which may be justly reposed, and the circumstances surrounding them, when it may or may not require the one party or the other to act, or a want of it may be deduced from inaction. A creditor may not have in his possession, or under his control, property or effects, which he has the right to retain for the payment of the debt, and to which right the security would be entitled on payment made by him. Having them, as we have seen, the law compels him, if he would preserve the liability of the surety to him, to good faith and reasonable diligence, in keeping and making them available. The payment of the debt by the principal, to whom the consideration has moved, and who is primarily liable, and bound to indemnify the surety, if he is compelled to make payment, is the great, controlling object in view. Now, if the principal tenders payment in full, after the debt is due, the creditor is bound to accept it, or the surety will be discharged. It is bad faith towards the surety, on the part of the creditor, to refuse; for he may thereby invert the order in which principal and surety are liable, as between themselves; and he changes the nature and character of the liability of the surety, compelling him to guarantee for a further and additional period of time the ability of the principal to make the payment. The tender having been made, the relation of the creditor and principal is changed—the only duty of the principal is to keep the tender open, ready for the acceptance of the creditor whenever he manifests it. If he is sued by the creditor, he may bring into court the sum tendered, without any accruing interest, or compensation for the forbearance during the intervening period. There is, in effect, a new loan to the principal, payable on demand, with-

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out interest, to which the surety is not a party, and gives no assent.—Brandt on Suretyship, § 295, and authorities cited in note. We speak now of cases in which there is a formal tender, and a refusal to accede to it by the creditor, which would constitute a defense for the principal, if he kept it open and ready for acceptance.

There is another class of cases, which the present case more nearly resembles, in which there may not be the formalities of a tender, and no fact or circumstance affording the principal any defense against the claim of the creditor, or which places them in the relation of adversaries. There may be an offer of payment, which the principal may, at the request of the creditor, and for his ease and accommodation, forbear from converting into a formal tender, absolving him from liability for future interest, and for the costs of suit, if he kept the tender open. To this class belongs the case of *Clark v. Sickler*, 64 N. Y. 231, referred to by the chancellor. The principal, Mott, then being solvent, but subsequently becoming insolvent, offered to pay the debt; but the creditor declined to receive payment, giving no other reason than that he had no use for the money, and requested Mott to keep it; to which he assented. It was held, that the surety was not discharged; that the indulgence to the surety was merely gratuitous, not compelling the creditor to delay for any definite period of time, and not disabling him from suing, or taking any other step for the payment of the debt the surety had a legal right to require him to take.

There is an obvious distinction between that case and the present. If the surety had immediately paid the debt, Mott being solvent, his remedies for reimbursement would have been equal to any the creditor could have pursued. In this case, the principal was dead, and his estate insolvent. If the surety paid the debt, he would have been a mere general creditor of the principal, entitled only to share with other like creditors in the distribution of the assets, diminished, as they must be, by the payment of preferred claims. If the creditor had accepted payment, as proposed by the administratrix, and as it was her right to propose, and as he had the right of accepting, the debt would have been extinguished in full, and without offending the rights of other creditors, whether preferred or general.—*Pitcher v. Patrick*, Minor, 321; *Perrine v. Warren*, 3 Stew. 151; *Godbold v. Roberts*, 7 Ala. 622. In his transactions with the administratrix of the principal, good faith to the surety required, that the creditor should not be unmindful of, and indifferent to, the injury he was directly, and for no assigned reason, inflicting of his own volition. It is a duty the creditor owes the surety, in his deal-

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ings with the principal, to protect, so far as he can consistently with the preservation of his own rights, the rights and interests of the surety. Their right and interest is indeed the same—the performance of the contract, or the payment of the debt—the right of the creditor to payment or performance from principal or surety, one or both—the right of the surety to payment or performance primarily by the principal. A creditor, who voluntarily interposes obstacles, which prevent the surety from pursuing the creditor according to the remedies the law affords him, would not be allowed to recover of the surety. If he declines or refuses accepting payment from the principal, when it is offered, and the means of making the payment are in his own hands, which he surrenders to the principal, though he could rightfully retain them, and he knows that the result of his conduct will inflict irreparable loss on the surety, it is difficult to abstain from imputing to him a want of *good faith*, or of distinguishing between his conduct and an interposition of obstacles preventing the surety from being fully indemnified. The liability of the surety, which could be immediately extinguished, is, without his assent, prolonged. Not only is it in this case prolonged, but the death and insolvency of the principal in fact increases its burdens; for he can not obtain from the estate of the principal full indemnity, when the creditor may elect to compel him to payment.

As the case is now presented, without any explanation of his conduct from the creditor, it is a little difficult to avoid the inference, that there was a design on his part to fasten on the property of the surety a liability for the debt, in ease of the estate of the principal. If that be true, there can be no doubt the law condemns his conduct, and relieves the surety, whose rights and interests he was bound to respect, and compels him to look for payment to the principal, whom he intended to favor at the expense of the surety. In *Sears v. Van Dusen*, 25 Mich. 351, the holder of a promissory note refused to receive payment, when tendered by the makers, and delayed its collection until they became insolvent. This conduct, it was held, discharged the payee, who had guaranteed unconditionally the payment of the note, and whose relation is not distinguishable from that of a surety.—*Donley v. Camp*, 22 Ala. 659. It is to be remarked of this case, that there was no formal tender, changing the condition of that of the makers to the duty of keeping the tender open for the acceptance. There was a mere offer of payment (without presenting the money, and without evidence that the makers then had it, save so far as it could be inferred from their credit and business), which the holder declined, because he

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did not need the money. It was for his ease and accommodation, that the payment was not made.

In *McQuesten v. Noyes*, 6 N. H. 19, there was an offer of payment by the principal; but the creditor did not accept it, and made a mere general agreement that he would wait for payment, and the principal could retain the money. The court regarded the transaction as a new loan of the money, to which the surety was not a party. In *Saille v. Elmore*, 2 Paige, 497, it is said by Ch. WALWORTH, that a surety will be discharged by any arrangement or dealing between the principal debtor and the creditor, which operates as a fraud on the surety; "as if the money had been offered to the creditor, at the day it fell due, or afterwards, and he had, without the consent of the surety, requested the debtor to retain it longer, this would operate as a fraud upon the surety, and discharge his liability." In *Joslyn v. Eatman*, 46 Vt. 258, there was a tender of payment by the principal, which the creditor declined receiving; and it was held, that the surety was discharged. The tender was of a character which would have discharged the principal, if he had kept it open; and as it would have discharged him, it discharged the surety, whose obligation was accessorial—he could not be compelled into the new relation of a guarantor, that the principal would keep it open for the creditor, when he chose to manifest a willingness to accept it. To the same effect are the cases of *Johnson v. Ivey*, 4 Cold. (Tenn.) 608; *Hayes v. Joseph*, 26 Cal. 535; *Curia v. Puckard*, 29 Cal. 194.

There is another class of cases, which seem to be the subject of a conflict of decision: when a creditor, having in his possession, or under his control, the means of satisfying the debt, yet chooses not to make the appropriation, and voluntarily parts with them. It may be conceded that, ordinarily, a creditor is not bound to assert and exercise the right, not existing at common law, conferred by statutes, of setting off the demand or debt he may have against the principal and surety, against a demand or debt which may be due from him to the principal. The assertion of such right might involve him in litigation with the principal, into which it may not, in the absence of peculiar circumstances, be his duty to enter. The failure to assert the right, compelling suit by the principal, can be no more than his mere passiveness, in the absence of peculiar circumstances, in pursuing legal remedies; for the plea of set-off is in its essence a cross-action. To this class belong the cases of *Glazier v. Douglass*, 32 Conn. 393; *Hollingsworth v. Turner*, 44 Ga. 11; *Beaubien v. Storey*, Speer's Eq. 508, to which we have been referred. We do not dissent from the conclusion reached in these

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cases; nor do we now intend intimating under what circumstances it would be the duty of the creditor to insist on a right of set-off against the principal, for the ease of the surety.

The present case stands on a different ground: there was no necessity for the creditor to assert it—no peril of litigation with the principal, if he made the claim. The means of payment were in his hands, and it was his duty; the principal, by his proposal that they should be applied in payment of the debt, placing him in no other position than that of accepting or refusing the proposition. He had simply to retain, instead of paying the money to the principal; and the retainer operating not only to extinguish the liability of principal and surety, but his own liability to the principal. In *Law v. East India Company*, 4 Vesey, 824, the creditor had made a settlement with the personal representative of the principal, and paid to him a balance supposed to be due the principal on a settlement of his accounts as an officer of the company. Subsequently, a claim was made upon Law, as a surety on the official bond of the principal; and it was held he was discharged. The case was attended by peculiar circumstances, influencing its decision; but the underlying principle is, that the creditor must do no act, which may injure the surety; and if he does such an act, borrowing the words of the Master of the Rolls, "the court is very glad to lay hold of it in favor of the surety."

In *McDowell v. Bank*, 1 Harr. (Del.) 369, the creditor, a bank, had on general deposit moneys of the principal, sufficient to pay the debt, but permitted the principal, from time to time, after maturity of the debt, to withdraw them by checks; and the surety was held discharged. The same principle is recognized in *Dawson v. Real Estate Bank*, 5 Ark. 296-99. The cases of *Martin v. Merchants' Bank*, 6 Harr. & Johns. 235, and *Voss v. German Am. Bank*, 83 Ill. 599, assert the contrary doctrine. Assuming, as we think it must be assumed, that a bank has a lien on any balance which may be due from it to a customer, on any moneys he may have on general deposit—not moneys deposited for special purposes, of which the bank is informed, and either expressly or impliedly consents to hold for such purposes—for the payment of a debt due to it for money borrowed, or for a debt negotiated to it in the usual course of trade; we incline to the opinion, that it can not pay such balance, or such moneys, to the principal, without discharging the surety. It has not the option to part with the security it has acquired, without the consent of the surety. We are not trammelled by the broad expressions found in *Perrine v. Firemen's Ins.*

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Co., 22 Ala. 575, from which we expressed dissent in *Knighton v. Curry*, MSS.

Affirming a proposition that meets the present case, we hold, that when the principal offers the creditor the privilege of retaining, from moneys the creditor has in his hands, and is about paying to him, the debt due him from principal and surety, good faith to the surety requires him to accept; and if he refuses, when he could rightfully retain, without prejudice to the rights or equities of others, the surety is discharged. There is more, in such case, than mere passiveness on the part of the creditor—there is positive action in the refusal to accept the payment. More especially must this be true, when the creditor is dealing with the principal, in the absence, and without the knowledge of the surety. The case has its unpleasant features, which, unexplained, if they do not create a presumption of sinister motive, cast suspicion on the conduct of the appellee. It is so much out of the course of ordinary transactions, for a debtor to pay his creditor a large sum of money, without the deduction of a debt the creditor expresses a willingness to receive, that, when immediate injury must result to another, it is difficult to resist the conclusion the injury was intended. No importance can be attached to the fact, that there is no averment in the bill, that the attorney, Day, had specific authority to propose receiving the debt in payment, or as money, from the appellee. It does not appear that the refusal of the appellee was placed on that ground, when the proposal was made; and if the fact is he was without authority, how far the equity of the appellant is affected, will arise on a hearing on the evidence.

The bill showing that the surety was discharged from personal liability by the conduct of the appellee, the mortgage he had executed, which passed the legal estate in the premises, and was but a further security for the payment of the debt, was also discharged. It was but an incident of the debt of the surety, and could not survive its discharge, or extinguishment, or a voluntary release of it by the creditor. *Brandt on Suretyship*, § 21. The principal has not been discharged; and the mortgage remains a valid security on his equity in the premises. The sale the appellee was proposing to make, was a sale not only of this equity, but of the legal estate; and there can be no doubt of the power of a court of equity to restrain it.

The decree must be reversed, the injunction reinstated, the demurrer and motion to dismiss overruled, and the cause remanded.

[Davidson v. The State, ex rel. Woodruff.]

Davidson v. State, ex rel. Woodruff.*Information in nature of Quo Warranto, to try Right to Municipal Office.*

1. *Contested election; conclusiveness of judgment.*—The judgment rendered on the trial of a contested election, before a court or magistrate clothed with statutory jurisdiction of such proceeding, is conclusive in a subsequent action of *quo warranto*, as to the right to the office, in favor of the party to whom it is awarded.

2. *Contested municipal election under charter of Selma; filing papers.*—Under the charter of the city of Selma (Sess. Acts 1874-5, p. 362, § 16), jurisdiction to try a contested municipal election is conferred, not on the Circuit Court, but on the judge thereof as a magistrate; and there is no express requisition that the application and notice of contest shall be filed with the clerk, or in his office.

3. *Same; waiver of irregularities.*—When the parties to a contested election appear before the court or officer who is clothed by statute with jurisdiction to hear and determine the contest, and, without objecting to the sufficiency or regularity of the preliminary proceedings by which the contest was initiated, engage in a trial on pleadings and proof, defects in such preliminary proceedings are waived, and can not be set up in a subsequent action founded on the judgment.

4. *General charge on evidence, and invading province of jury.*—When the evidence, though partly oral, is without conflict, and establishes the plaintiff's right to recover, the court may instruct the jury, "*if they believe the evidence, they must find the issue in favor of the plaintiff.*" But it is error to add to such charge these words: "*The form of your verdict, under this charge, will be, We, the jury, find the issue in favor of the plaintiff.*" Although the general charge does not invade the province of the jury, these words take from them the right to determine the credibility of the oral testimony.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. GEO. H. CRAIG.

This action was brought in the name of the State, on the relation of N. W. Woodruff, against Robert J. Davidson, to test his right to hold the office of mayor of the city of Selma; and was commenced on the 29th September, 1879. On the trial, numerous exceptions were reserved by the defendant to the rulings of the court on the pleadings and evidence, and in the charges given; and all these rulings are now assigned as error, being twenty-three in all. The opinion of the court states the facts deemed material to an understanding of the points decided, and any further statement of facts is unnecessary.

WHITE & WHITE, PETTUS, DAWSON & TILLMAN, J. F. JOHNSTON, and SATTERFIELD & YOUNG, for appellant.

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CLOPTON, HERBERT & CHAMBERS, *contra*.

MANNING, J.—At an election for mayor of the city of Selma, on the 5th of May, 1879, the parties to this cause, Davidson and Woodruff, were voted for as candidates for the office; and upon a counting of the votes by the city council, whose duty it was, in the first instance, to do so, that body declared Davidson elected. He thereupon, after being duly sworn, entered upon the discharge of the duties of the office.

The charter of the city (Acts 1874-5,362) provides: "That if any municipal election, in and for the city of Selma, shall be contested, it must be contested before the judge of the Circuit Court of Dallas county; . . . and the judge trying the same may hear and determine the contestation in vacation, or in term time." According to section 18, "the party contesting shall file his application, and give notice of such contest to the judge of said Circuit Court, and the person or persons whose election is so contested, within fifteen days next succeeding said election." By section 20 it is enacted, "that after the testimony on both sides is completed, the judge trying the cause may examine the poll-list and ballots, and pronounce judgment in the cause according to the facts."

Woodruff contested the election with Davidson, and, on the 13th of the same month (May, 1879), presented to the judge of Dallas Circuit Court his application for that purpose, and made oath thereto before him; annexed to which, he delivered also to the judge a notice, that he therewith filed his application to him to hear and determine the contestation. The papers were marked, "Filed May 13th, 1879;" signed, "G. H. Craig, Judge."

The parties appeared before the judge; allegations of illegal votes cast, and of legal votes refused, at the election, were made on both sides; and an examination and trial were had, which resulted in a judgment of the circuit judge that awarded the office of mayor to Woodruff; and Davidson having refused to yield it, Woodruff brought this action against him, in the nature of the action of *quo warranto*.

That such a judgment, duly rendered in a contestation of that kind, establishes the right of the party to whom the office is thus adjudged, was settled in *Moulton v. Reid*, 54 Ala. 320. The subject was fully considered in that case, and it furnishes the rule by which this must be decided.—See, also, *Beebe v. Robinson*, 52 Ala. 66.

Appellant's counsel insist, however, that the circuit judge did not acquire jurisdiction to render the judgment set up; and they objected to the admission of it, and of other docu-

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ments connected therewith, as evidence on the trial of this cause. The authority of the judge, to try and determine such a contestation, they say, was of a special character, and could not be exercised without its being made to appear that every preliminary act, prescribed in the statute, was performed; and this, it is alleged, was not done in this instance, because the application to the judge, though handed to, and marked "filed" by him, was not filed with the clerk of the Circuit Court. Whether this would be essential or not, in any case, we need not pause to consider. We only remark, that the statute did not, as our quotations from it show, expressly require the filing to be with the clerk, or in his office; and the jurisdiction is not given to the Circuit Court, but to the judge thereof, as a magistrate.

When it appears, as in this case it does, that the subject-matter of a litigation is within the jurisdiction of the court or magistrate determining it, and the parties actually appear on both sides, and, making no objection to any omission in the preliminary proceedings by which the contestation is instituted, engage in controversy, by pleadings and evidence upon the merits of the claim, objections to the mode or form of such prior proceedings are waived. Parties cannot be allowed to speculate, in this manner, on gaining advantage of an adversary, who, if the decision go against him, will be bound by the judgment, and then be heard to contend that they are not bound thereby if it be rendered against them. *Rutherford's Adm'rs v. Smith*, 27 Ala. 417; *King v. Armstrong*, 14 Ala. 293.

The proceedings and judgment on that contestation were, therefore, properly admitted in evidence on the trial of this cause, *quo warranto*; and the circuit judge did not err in overruling the objections of defendant thereto.

The jury were instructed, "that if they believed the evidence, in this case, they must find the issue in favor of the plaintiff, N. Woodruff, and against the defendant, Robert J. Davidson." This charge referred it to them, as was proper, to determine what credit was due to the testimony of each witness; and in that form it was, according to our view of the case, unexceptionable. But it was not left so by the circuit judge. Exception having been taken to that charge, the bill of exceptions informs us, "the court then, after reading the above charge to the jury, said to them, 'The form of your verdict, under this charge, will be, *We, the jury, find the issue in favor of the plaintiff, N. Woodruff, and against the defendant, Robert J. Davidson.*'"

Very similar to this was the action of the circuit judge in *Crutcher v. M. & C. R. R. Co.*, 38 Ala. 584, except that the

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jury was not informed in this case, as in that they were, that by not finding a verdict as instructed, they might "subject themselves to the consequences of a contempt of court." But such a circumstance is not material so far as the legal question is concerned. This court, in that case, said: "If there was a question for the jury to determine, their deliberations should have been left free and uncontrolled. That there was such a question, is clearly implied from the charge given;" which was, "if *the jury believe the evidence*, they must find for the defendant." But, says the court, "in assuming to control the decision of that question the court erred. The charge" (meaning the whole charge, with the subsequent addition, that their deliberations "must result in a verdict for defendant") "is upon its face erroneous, in that it refers a question to the jury, and then assumes to control its decision."

That is exactly what was done here. By repeating the charge—that, "if they believe the evidence," they must return a verdict in favor of Woodruff—and then adding, "the form of your verdict, *under this charge, will be*, 'We, the jury, find the issue in favor of the plaintiff, N. Woodruff,'" &c., the circuit judge prescribed their verdict, and, consequently, decided a question of fact on which it depended, and which they alone had authority to determine.

It is a rule, founded on numerous cases in this court, that "when a question of fact is involved, dependent on oral testimony, the credibility of the evidence must be referred to the jury; and a charge assuming the credibility of the testimony, is erroneous, though it is clear and undisputed."—See the authorities collected in 1 Brickell's Dig. 336, § 8, and other sections; also, *Stewart v. Russell*, 38 Ala. 619.

To place himself in a situation to entitle him to be admitted as mayor, Mr. Woodruff must have taken the oath of office; and there was oral testimony that he had done so. But it was for the jury alone, and not for the judge, to pass on the credibility of this oral testimony, and determine what was proved thereby. That magistrate went beyond his province, when, in his charge, he assumed as true the evidence of the witness, and, upon such assumption, instructed the jury that, under the charge he had given them, the form of their verdict must be, "We, the jury, find the issue in favor of the plaintiff," &c. We cannot know that this error of the judge did not work an injury to the defendant; because we cannot know what conclusion on the question of fact the jury would have reached, if left untrammelled.

Let the judgment of the Circuit Court be reversed, and the cause remanded.

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Wilburn & Co. v. McCalley.**Fletcher v. McCalley.***Bills in Equity by Heirs, for Injunction of Judgments against Administrator.*

1. *Rights of property under constitution.*—The constitutional provision which declares that no person can “be deprived of his property but by due course of law” (Art. 1, § 7), secures to every person the right to have notice of any judicial proceeding by which his rights of property may be affected, and an opportunity to be heard, and to contest every material fact involved in the proceeding; and any law authorizing a judicial proceeding, by which his rights of property might be divested or affected, without giving him such notice and opportunity, would be unconstitutional.

2. *Construction of statutes, when assailed for unconstitutionality.*—In the construction of a statute, when assailed on constitutional grounds, it is the duty of the courts to adopt, if possible, such a construction as will bring it within the range of the constitutional powers of the legislature, and not to impute to a co-ordinate department of the government a violation of the fundamental law of the land.

3. *Giving note by administrator, binding on estate; contents of petition.*—When an executor or administrator desires to procure an order of the Probate Court, authorizing him to give a note which shall be binding on the decedent's estate (Code, § 2432), his petition must aver that he is the personal representative; must describe the debt, and state whether it was contracted by himself or by the decedent; if contracted by him, must allege the consideration, showing that it is within the terms of the statute, and that it was necessary, and that it is a reasonable charge; and must also disclose the names, and residences if known, of the heirs, devisees, distributees, or legatees, who are interested in the property sought to be charged.

4. *Same; jurisdiction of court, and irregularities in proceedings.*—In a proceeding under this statute, the jurisdiction of the court attaches on the filing of a petition, containing the essential averments above stated; and when the jurisdiction has thus attached, by analogy to proceedings in that court for an order to sell a decedent's lands, subsequent errors and irregularities do not affect the validity of the order, when collaterally assailed.

5. *Same; notice to heirs, devisees, &c.*—Notice should be given to the heirs, devisees, or other parties in adverse interest, that they may have an opportunity to controvert the averments of the petition; yet, when the jurisdiction of the court has attached, by the filing of a proper petition, the failure to notify the heirs, &c., is a mere irregularity, and does not affect the validity of the order when collaterally attacked.

6. *Same; when order is void, and does not create cloud on title.*—If the petition of the administrator does not contain the averments necessary to give the court jurisdiction, an order founded on it, authorizing the administrator to give his note as prayed, would be *coram non judice*, and void; and a judgment rendered on the note, and a sale under execution thereon, would neither pass title, nor create a cloud on the title.

7. *Same; equitable relief to heirs or devisees.*—When an order is granted by the court as prayed, although the petition is substantially defective, the order being void, and a judgment rendered on the note being also void, the heirs or

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devisees can not maintain a bill in equity to enjoin a sale under it; and if the petition was sufficient, and they had due notice of it, they can not have equitable relief against the judgment, in the absence of fraud in the procurement of the order, or something equivalent to it; but, if the petition was sufficient, and they in fact had no notice of the proceeding, a court of equity will, at their instance, perpetually enjoin a sale of the property of the estate under a judgment on the note given by the administrator, on averment and proof that the debt for which the note was given was not, within the terms of the statute, a proper charge against the estate.

8. *Wife's separate estate, statutory and equitable; how charged.*—There is an essential difference in the manner of charging the statutory separate estate of a married woman and her equitable separate estate, or separate estate by contract: the former is charged by the statute (Code, § 2711) with the price of certain articles, the character of which is specified, and her agency in purchasing them is immaterial; while the latter can only be charged by the act and agreement of the wife, and, in the absence of restraining words in the instrument creating the estate, may be charged to the same extent as if she were a *feme sole*.

9. *Remandment, on reversal, for amendment of bill.*—When the chancellor overrules a demurrer to the bill for want of equity, and, on final hearing on pleadings and proof, renders a decree for the complainant; this court, on reversing his decree, and holding the bill demurrable, will remand the cause, in order to give the complainant an opportunity to ask leave to amend in the court below, unless the defects are not capable of amendment.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE.

These two cases were argued and submitted together, and present precisely the same questions. The bills were filed by the same parties, and on the same day; and they are almost identical in language, except in the statement of names, amounts, &c., connected with the two judgments against which relief was sought. The bills were filed on the 2d September, 1875, by Archie McCalley and James R. McCalley, children of Martha A. McCalley, deceased, and of William J. McCalley, her surviving husband; against the said William J. McCalley, as the administrator of his deceased wife, and three minor children of the said William J. and Martha A. McCalley, and Algernon S. Fletcher (in one case), and the partners comprising the mercantile firm of George W. Wilburn & Co. (in the other); and sought to perpetually enjoin, annul, and set aside two judgments, rendered by the Circuit Court of Madison, one in favor of said Fletcher, and the other in favor of said George W. Wilburn & Co. The bills contained the following allegations:

(1.) That complainants and defendants all reside in said chancery district. (2.) That the infant defendants have no guardian, and live with their father; and their ages are stated. (3.) That the complainants and said infant defendants are the children of said William J. and Martha A. McCalley, who were husband and wife. (4.) That said Martha A. McCalley departed this life, in said county of Madison, on the 11th August, 1868. (5.) That prior to her death, and on

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the 10th August, 1868, "she executed a paper purporting to be her last will and testament, but the same was never probated;" and that she died seized and possessed of certain lands, "which she held as her statutory separate estate," and which are particularly described. (6.) That, "on the death of said Martha A. McCalley, these lands descended to complainants and said" infant defendants, who were her only children. (7.) That letters of administration on her estate were duly granted, on the 16th April, 1870, to said William J. McCalley, and he is still acting as such administrator. (8.) That the said William J., as administrator of Martha A. McCalley, on the 26th August, 1872, executed a bond, which is set out, in the following words:

"Huntsville, Ala., August 26, 1872.

"Twelve months after date, as administrator of Martha A. McCalley, deceased, I promise to pay to A. S. Fletcher, or order, the sum of eight hundred dollars, value received. This note is given under section 2066 of the Revised Code of Alabama, to extend a debt due the late firm of Scruggs, Robinson & Fletcher, from the estate of Martha A. McCalley, deceased. This note is at this time the individual property of A. S. Fletcher, and is to bear interest from date. Witness my hand and seal." (Signed, "W. J. McCalley, adm'r of M. A. McCalley," and seal affixed.)

(9.) That said Fletcher, after the maturity of this note, instituted a suit on it, in the Circuit Court of Madison, against the said W. J. McCalley as such administrator; and on the 19th June, 1875, recovered a judgment against him, for \$979.54, besides costs. (10.) That an execution has been issued on this judgment, and is in the hands of the sheriff, and has been levied by him on the lands before described; and he has advertised them for sale under the execution. (11.) "Your orators are informed that it is claimed by said Fletcher that said bond was executed by said W. J. McCalley as such administrator, under an order of the Probate Court of said county of Madison. Your orators do not know whether any such order was made, or not; but, if such order was made, it was without authority of law, and in fraud of your orators and said" infant defendants; "and your orators aver and charge that neither they, nor the said" infant defendants, "had any notice of any application for said order by the said W. J. McCalley as such administrator; that they were not parties to said proceeding, either directly or indirectly; and that they had no knowledge of the execution of said bond, until after said judgment was rendered, said execution levied, and said property advertised for sale. They

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further allege that they are informed and believe, and upon such information and belief charge the fact to be, that said bond was not executed to extend any debt contracted by the said Martha A. McCalley in her life-time, and that the same is not a charge upon her estate descended to them and the said" infant defendants. (12.) That when said bond was executed, and when said order was made (if any such was obtained), complainants were minors, and had no guardian; and they, with said infant defendants, resided with their father, the said W. J. McCalley. (13.) "They charge that the said W. J. McCalley never informed them of the existence of any such debt, nor of the existence of said bond; and they were wholly ignorant of either of such alleged facts, until as hereinbefore mentioned." (14.) That said W. J. McCalley made no defense to said action at law, except to have an appearance entered by consent for a continuance, and judgment was rendered against him by *nil dicit*. (15.) They pray "that said Fletcher be enjoined from further prosecuting his said suit, and that said judgment be cancelled, set aside, and held for naught;" and the general prayer, for other and further relief, is added.

In the case against George W. Wilburn & Co, the allegations of the bill were, in substance and language, the same as above stated; but the note, which was set out, was as follows: "Huntsville, Ala., March 30th, 1874. Six months after date, with interest from date, I promise to pay to the order of George W. Wilburn & Co. the sum of seven hundred and fifty-three 97-100 dollars. This note is given pursuant to an order of the Probate Court, granted this day. Value received." (Signed, "W. J. McCalley, administrator of Martha A. McCalley, deceased.") The judgment on this note was also rendered on the 19th June, 1875, and was by *nil dicit*.

Answers were filed by said Fletcher and Wilburn & Co., which were substantially the same. They admitted the death of Mrs. McCalley, the grant of letters of administration on her estate, and that she was seized and possessed of the lands described in the bill, "which was her statutory separate estate;" but each answer was afterwards amended, by striking out this admission, and alleging that she held the lands as an equitable separate estate, under a deed of gift from her mother, Mrs. Ann Lanford, since deceased, a copy of which was made an exhibit to each answer, and by which the marital rights of said W. J. McCalley were excluded. Each of the respondents admitted, also, that Mrs. McCalley "did make a last will and testament before she died, and that the same has never been probated;" and they alleged that this

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will was in the possession of the complainants and their father, and was fraudulently suppressed by them.

In reference to the note on which his judgment was founded, Fletcher answered thus: "Said bond was executed by said W. J. McCalley, administrator as aforesaid, for the purpose of extending or settling a debt of the estate of said Martha A. McCalley, upon his own application to said Probate Court; a copy of which, with the order of said court thereon, is herewith filed as an exhibit, marked A. F., and asked to be made a part of this answer. Said account, or debt, so extended, was contracted during the life-time of the said decedent, and was for goods, merchandise, and supplies furnished her, and which were articles of comfort and support of herself and family, suitable to the degree and condition in life of the said decedent, and for which the husband would have been liable at common law; and said goods were sold, and credit was given, upon the faith and credit of her said separate estate only." But this paragraph of the answer was afterwards amended, thus: "Said deed of conveyance, hereinabove set forth, vested said lands in said decedent to her sole and separate use, free from the management and control of her said husband, and was her equitable separate estate, and chargeable with her debts and contracts as if she were a *feme sole*; and the consideration of said bond, which was the basis of said judgment, was for debts contracted during the life-time of the said Martha A. McCalley, upon the faith and credit of her said estate, her said husband being notoriously insolvent, and said debt is a charge upon and against said estate."

In reference to the debt due to George W. Wilburn & Co., said Wilburn & Co. answered: "Said note was given for the purpose of extending or settling a debt of the estate of said decedent, a part of which was contracted in her life-time, and a part of which was contracted by the said W. J. McCalley, as administrator of the said Martha A. McCalley, for articles for the said estate; and said note was executed by authority of the Probate Court of Madison, which had jurisdiction of said estate. The order of said court to give said note was made under section 2066 of the Revised Code of Alabama. And defendants further say, that that part of the consideration of said note arising before the death of the said Martha A. McCalley was for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband of said decedent would have been responsible at common law;" and that the lands described were held and owned by Mrs. McCalley, at the time of the purchase of said articles, and at

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the time of her death, as her statutory separate estate under the laws of Alabama. "A copy of the petition of said W. J. McCalley, as administrator as aforesaid, sworn to by him, and representing that respondents' said claim was a just claim against said estate, together with the order of said court thereon," was made an exhibit to the answer. These averments of the answer were afterwards changed by amendment, as in the former case, so as to show that the lands were held by Mrs. McCalley as an equitable separate estate under the deed from Mrs. Lanford, a copy of which was set out, and that the respondents' debt was a charge on that estate.

Each of said defendants demurred to the bill, for want of equity, and "because said bill shows on its face that the complainants are not entitled to the relief prayed, nor to any relief whatever." After the filing of the original answers, the defendants submitted a motion to dissolve the injunction, for want of equity in the bill, and on the denials of the answer; but the chancellor overruled the motion. The causes were afterwards submitted for final decree, on the bills and exhibits thereto, and the answers and exhibits thereto; and the chancellor rendered a decree in each case for the complainants, perpetually enjoining the judgments. The interlocutory decree on the motion to dismiss the injunction, and the final decree, are now assigned as error by said Fletcher and Wilburn & Co. respectively.

D. D. SHELBY, and BRANDON & JONES, with whom were CABANISS & WARD, for the appellants.—1. The injunction ought to have been dissolved on the denials of the answer, even if the bills contained equity.—*Satterfield v. John*, 53 Ala. 127; *Miller v. Bates*, 35 Ala. 580; *Rembert & Hall v. Brown*, 17 Ala. 667; *Yonge v. Shepperd*, 44 Ala. 315; and authorities cited in 1 Brickell's Digest, 677, § 548.

2. The bills contained no equity. The *gravamen* of each bill is, that the complainants were not notified of the administrator's application for an order authorizing him to extend the debts of the estate. But they were not entitled to notice. It is a strictly statutory proceeding, and intended for the benefit of decedents' estate. No notice is required to be given to the heirs or distributees, since the administrator himself represents their interests; and if he is guilty of any negligence, or other misconduct, by which their rights are prejudiced, they have a remedy on his official bond. There is no specific allegation of fraud in the judgments, and general allegations avail nothing.

3. The bills can not be sustained on the ground of re-

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moving a cloud on the complainants' title to the lands. *Daniel v. Stewart*, 55 Ala. 278; *Longstreet v. Sedgwick*, 55 Ala. 291; *Lockett v. Hurt*, at the last term.

WATTS & SONS, *contra*.—The bills are not to be considered as ordinary bills to enjoin the collection of money under ordinary judgments and executions at law. Their purpose is, to annul and set aside judicial proceedings, which injuriously affect the complainants' rights; to which they were not parties, and therefore could not appeal; and of which they had no notice, actual or constructive. That no man's property can be taken from him, "but by due process of law," is a constitutional guaranty; and that this implies and requires notice of any judicial proceeding, by which his rights are to be affected, is an elementary principle of law. To show a right to equitable interference in their behalf, it was only necessary for the complainants to acquit themselves of negligence, and file their bills before any sales were made under execution. The cases are the first that have arisen under this statute, which confers extraordinary powers on executors and administrators; and the court will not put such a construction on the statute as will make it of doubtful constitutionality. If the bills are technically defective, the complainants should have an opportunity to perfect them by amendment.

STONE, J.—These cases present the same questions. According to the averments of the bills, Mrs. Martha A. McCalley, a married woman, made her will, and devised certain lands to complainants, her children. She died, and William J. McCalley, her husband, became her administrator. Under an order of the Probate Court, the said William J., as administrator, executed notes, expressing that they were given under section 2432 [2066] of the Code of 1876, "to extend a debt due from the estate of Martha A. McCalley, deceased." These notes were put in judgment against McCalley, as such administrator. The bills charge that, under executions issued on said judgments, the sheriff had levied on lands of complainants, which had come to them under the will of their mother, and would sell the same, unless restrained by injunction. The bills then aver, that the said devisees, complainants, had no "notice of any application for said order by the said William J. McCalley, as such administrator; that they were not parties to such proceeding, either directly or indirectly; and that they had no knowledge of the execution of said notes, until after said judgments were severally rendered, said executions levied,

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and said property advertised for sale." Injunctions, restraining the sales, were granted on each of these bills; and the chancellor overruled a demurrer to them, and retained the injunctions. This decretal order is assigned as error in this court.

Section 2432 of the Code enacts, that "any executor or administrator, by authority of the Probate Court, given on his application, may, in his representative capacity, give his note, bond, or bill, for the purpose of extending or settling a debt of the decedent, or settling a debt contracted by such representative, for articles or for work and labor for the estate; and for such note, bond, or bill, the estate is liable, and the executor or administrator is not personally liable." It will be observed that the debts which the executor or administrator may settle under this section, are of two classes; first, a debt of the decedent; and second, a debt contracted by such representative for articles, or for work and labor for the estate. On no other consideration can such representative give a note, bond, or bill, and thereby fasten a liability on the estate. One effect of the giving of such note, bill, or bond is, that the personal representative, although the contracting party, fixes thereby no personal liability on himself. Yet the order, under which he obtains authority to bind, not himself, but the property of another, is obtained on his application. The effect of such order, when rightly obtained and acted on, is to bind the property of the testator, or intestate, against the claims of distributees, legatees, heirs, or devisees, if the statute be carried out according to its letter: a contract by, and judgment against one person, and a liability thereby fastened on the property of another, for its payment. Can this be done, without notice, and an opportunity to defend, given to those in whom the title of the property is vested?

The question, it seems to us, suggests its own answer. No person can "be deprived of his . . . property, but by due course of law."—Declaration of Rights, § 7. The rights of use, enjoyment, and disposal are inherent in the ownership of property; and it is these rights the constitution guarantees. This provision of the constitution protects the rights of property, against legislative confiscation, and secures to every one a trial by judicial proceeding, before he can be divested of his title.—*Dorman v. The State*, 34 Ala. 216; *Sadler v. Langham*, *Ib.* 311; *Zeigler v. S. & N. Ala. R. R. Co.* 58 Ala. 594, and authorities cited. In the case last cited, we said: "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of his life, liberty,

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or property, in its most comprehensive sense ; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved."

If section 2432 of the Code must be construed as conferring the power on the Probate Court to grant the order therein provided for, on the mere *ex-parte* application of the personal representative, without notice to the heirs, devisees, distributees, or legatees, as the case may be, and without an opportunity for judicial contestation ; and if, under it, a note, bill, or bond may be executed by such personal representative, and the estate, real or personal, of the decedent, become bound thereby,—such construction would force us to declare it unconstitutional. Such *ex-parte* order would not only not be "due course of law," but might, and probably would, be made the instrument of most alarming frauds. It is our duty, when we can, to so construe acts of the legislature, as to bring them within the range of constitutional power, and not to suppose that a co-ordinate department of the government has violated the fundamental law of the land.

The statute we are construing, is very brief in its expressions, if not meagre in its provisions. It makes no special mention of the facts necessary to be averred in the application, nor of the form it shall assume. It does not inform us who, if any, are to be made parties ; who, or how to be notified ; nor does it provide any machinery, other than the application, by which the judicial function is to be brought into exercise. Of course, the conditions on which the statutory power depends must be averred—namely, that the petitioner is the personal representative ; that decedent left an estate, and died owing a debt, describing it, which it is the object of the petition to obtain authority to extend or settle ; or, as the case may be, that the debt, describing it, was contracted by the personal representative, for articles, or for work and labor for the estate, and showing a sufficient reason why such debt was contracted by the personal representative ; and that the debt, so contracted, was necessary, and a reasonable charge. The substance of the foregoing should be averred in the application ; because each of the propositions is material, and upon each an issue of fact may be formed. An application to the Probate Court, under the statute we are considering, would be defective, and insufficient, if it did not contain the substance of all the above averments, and also disclose the names, and residences if known, of the heirs, devisees, distributees, or legatees, dependent on the inquiry, whether the decedent left a will,

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and whether the property sought to be charged was real or personal estate. And notice should be given to such heirs, devisees, distributees, or legatees, thereby giving them an opportunity to controvert the averments of the petition. The Probate Court should, in no case, grant such order, until every material fact specified above is established by proof.—*Brown v. Wheeler*, 3 Ala. 287; *McCurry v. Hooper*, 12 Ala. 823.

What is the effect of such order, when obtained, and what intendments are to be indulged in relation to such proceedings, when they come up collaterally? We do not doubt that, when an application is filed, containing the averments stated above as necessary, the Probate Court acquires jurisdiction to make the order. The rules which govern in such cases, must be assimilated to those which obtain in proceedings in the same court, for an order to sell property to pay debts, or for distribution. If the order be granted on a petition, such as that specified, then a sale made under a judgment rendered on a note, bill, or bond given under such order, will pass the title. If the application or petition be wanting in any of the material averments of fact, necessary to give the court jurisdiction, tested by the rules which prevail when the legality of an order of sale granted by the Probate Court is presented collaterally, then an order made on such petition is *coram non judice*; and a sale, made under a judgment rendered on a note, bill, or bond thus executed, would be void, and neither pass the title, nor create a cloud upon it.—1 Brick. Dig. 939, §§ 353, 355; *Bishop v. Hampton*, 15 Ala. 761; *Jones v. Jones*, 42 Ala. 218; 1 Brick. Dig. 940, §§ 364, 365; *Hoard v. Hoard*, 41 Ala. 590; *Pettus v. McLanahan*, 52 Ala. 55; *Bland v. Bowie*, 53 Ala. 152; *Arnett v. Bailey*, 60 Ala. 435; *Rea v. Longstreet*, 54 Ala. 291; *Lockett v. Hurt*, 57 Ala. 198. If, however, the application or petition contains the necessary averments to give the court jurisdiction, and the court commits error afterwards—such as, a failure to notify the parties in adverse interest—this would not avail, on collateral presentation, to avoid the order, the judgment, or the title acquired at a sale under it.—*Field v. Goldsby*, 28 Ala. 218, and authorities cited.

The extract from the bills in these cases, given above, contains all that is said about the application to the Probate Court for authority to execute the notes, brought to view in these suits. It does not state what the application contained; nor can we learn therefrom that it contained the necessary averments to give the Probate Court jurisdiction. If it did not, then the proceeding was *coram non judice* and void, and the Chancery Court would not entertain the bills. A

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title, acquired under such sale, would fall of its own weight; and, hence, it could not operate a cloud on the title of the devisees.—*Lockett v. Hurt, supra*. The present bills are defective, in that they do not show what the application contained. On the other hand, if the petition was sufficient, and the devisees had notice of its filing, and the Probate Court proceeded thereon to make the proper order, under which the notes were executed; then, in the absence of fraud in the procurement of the order, or something equivalent to it, the complainants are entitled to no relief, and their bills are without equity.

There is a remaining phase of these cases. The liability of Mrs. McCalley's estate, if there be a liability, rests on the term of the statute, of which a copy is given above. Under that statute, as we have shown, the personal representative of an estate may obtain from the Probate Court authority to make a contract, for the performance of which the estate of his testator, or intestate, is liable. This is a new power conferred on representatives of estates; a power, given by law, to one person, to bind, by his personal contract, the property of another. It is not for us to question the policy of this statute. Our duty is to expound and obey it.

In ordinary cases of sheriff's sales, or offers to sell real estate under final process, the execution is against the person whose land is sold, or sought to be sold. Hence, in an action brought to recover lands purchased at a sheriff's sale so made, the plaintiff need only show the judgment of the court, execution issued thereon, and the sheriff's sale and conveyance under the execution. This makes out his title; and errors committed before judgment, for which it would have been reversed on appeal, will not impair his title in the least. Even a failure of the record to affirm that the defendant had been served with writ or summons, will avail nothing in defense of the ejectment, if the court rendering the judgment had jurisdiction of the subject-matter.—1 Brick. Dig. 632, §§ 117, 118; *Budger v. Lyon*, 7 Ala. 564. If a sheriff were about to sell lands under an execution, issued on a judgment rendered in a suit of which the defendant had had no notice, it would become necessary for such defendant to move in the premises, before the sheriff perfected his sale and conveyance. If, in fact, the judgment had been rendered without notice to the defendant, and there was a valid defense to the action on the merits, chancery would intervene, re-try the question on the merits, and perpetually enjoin the judgment, if the defendant proved his defense, and the other allegations of his bill.—1 Brick. Dig. 670, §§ 435, 436; *Ib.* 668, §§ 409, 410.

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In analogy to this principle, we hold that, if the application to the Probate Court contained sufficient averments to give the court jurisdiction, and if the complainants (devisees) were in fact not notified; then, if the averments of their bills be true, the debts for which the renewed notes were given, were not the proper debts of Mrs. McCalley, and chancery will give relief, and perpetually enjoin the enforcement of the executions against the property of her estate. If the bills were so amended as to present this shape, they would contain equity.

There are apparent errors in the records we have not pointed out. The bills allege Mrs. McCalley's separate estate was statutory. The record tends to show it was equitable. This is a very material inquiry in these causes. The manner of charging the two estates is essentially different. The statutory estate is not charged by the contract of the married woman. She can make no contract, such as this. True, her estate may be charged, "for articles of comfort and support," under section 2711 of the Code of 1876. This, however, does not rest on the theory, that the wife has made the purchase. The husband may fasten this charge as well as the wife. It is a mere legal liability of the wife's estate, which the statute itself raises. The equitable estate is controlled by entirely different principles. It can be charged only by the act and agreement of the wife, and, unless there are restraining words in the instrument which creates it, she can charge it to the same extent as one *sui juris* could.—2 Brick. Dig. 86, §§ 211, 212, 213; *Cowles v. Morgan*, 34 Ala. 535; *Short v. Battle*, 52 Ala. 456. There would seem, also, to be a defect in the testimony, even if the averments of the bills were sufficient. The final decrees are also assigned as error, and this assignment must also be sustained.

The demurrers to the bills were overruled in the court below, and the bills pronounced sufficient. If they had been sustained, complainants, on their motion, would have been allowed to amend. We can not entertain a motion of that kind, and can not know whether an amendment can be made, which will impart equity to the bills under the principles of this opinion. Unless the bills are amended, so as to show that the application to the Probate Court contained the necessary averments to give that court jurisdiction, they will be wanting in equity, and the injunctions should be dissolved, and the bills dismissed. We reverse and remand the causes, in order that the chancellor may consider any application that may be made to amend the bills, and make all orders that may be necessary according to the principles of this opinion.

Reversed and remanded.

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Bill in Equity to set aside Probate of Will.

1. *When remainder is vested.*—Under a devise of lands to a married woman for life, “and after her death to her children then living,” the children take a vested remainder, as distinguished from one that is contingent.

2. *Competency of devisees and legatees as attesting witnesses to will, under act of 1806, and Code of 1852.*—The act of 1806, relating to the attestation of wills, and devises or bequests to subscribing witnesses thereto (Clay’s Digest, 596, §§ 1-8), was a substantial re-enactment of the English statutes (29 Car. 2, and 25 Geo. 2); and the latter statute, declaring a legatee or devisee competent as an attesting witness, but avoiding his legacy or devise, was carried into the Code of 1852 (§ 1608).

3. *Same; under act of February 14, 1867, and Revised Code.*—This section of the Code of 1852 (§ 1608) was expressly repealed by the act approved February 14, 1867 (Sess. Acts 1866-7, p. 455), and was therefore omitted from the Revised Code of 1867. But this repeal and omission did not revive the common-law rule as to the competency of legatees and devisees as attesting witnesses to wills: it was the effect and result of the general statute, of which the repealing section was a part, and which was intended as a revision of the whole subject of the competency of witnesses as affected by interest or connection with the suit or proceeding.

4. *Competency of witnesses as affected by interest; exception as to suits by or against executors or administrators.*—The great purpose of the said act of February 14, 1867 (Rev. Code, § 2704), was to enlarge the competency of witnesses, by removing interest or connection with the cause as a disqualification; and the only exception or exclusion made by the statute was as to transactions with, or statements by any deceased person, whose estate was interested in the result of the suit; the reason of the exclusion being, that there should not be admissibility, where there can not be mutuality. The present statute (Code, § 3058) is a continuation of the same policy.

5. *Application for probate of will; nature of proceeding.*—An application for the probate of a will, in the Probate Court, is a proceeding *in rem*, the purpose of which is to establish the *status* of the estate; and it does not assume the form or character of a suit *inter partes*, until the heirs or distributees intervene as parties.

6. *Contest of probate of will in equity.*—If the application for probate is not contested in the Probate Court, but the heirs or distributees afterwards seek to set aside the probate by bill in equity (Code, § 2336), which is a statutory substitute for probate in solemn form, the character of the proceeding is not changed so far as the estate is concerned, though it is an adversary suit between the parties claiming under and against the will.

7. *Competency of legatee or devisee as attesting witness to will.*—It results from the principles above stated, that under the Code of 1867 (§ 2704), and under the present Code (§ 3058), a legatee or devisee may be an attesting witness to the will, and may testify to its execution in any suit or proceeding in which it may be involved.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE.

The bill in this case was filed on the 11th day of December, 1878, by the heirs-at-law of Samuel W. Coons, deceased,

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being his surviving brothers and sisters, and the children of those who were dead, against Mrs. Mildred Kumpe (formerly Barclay) and her husband, and also against her children by her former husband; Mrs. Kumpe (then Mildred Barclay) being the executrix of the last will and testament of said Samuel W. Coons, and she and her said children, with several other persons (who were also made defendants to the bill), being legatees and devisees under said will. The object of the bill was to set aside the probate of said will, which had been granted by the Probate Court of said county on the 28th January, 1878. The testator died on the 20th December, 1877, and his will was admitted to probate without any contest. The will was dated the 26th April, 1877, and contained the following provisions: The first clause bequeathed to Mrs. Clarissa H. Toney, the mother of his deceased wife, "a comfortable support during her life, suitable to her condition in life," and specially charged it on the lands on which he resided, and which had been devised to him by his deceased wife; and the other clauses were in these words: "2 Subject to said charge for the support of my said mother-in-law, I devise said lands to Mildred A. Barclay, during her natural life. 3. I charge the reversion of said lands, after the death of said Mildred A. Barclay, with the payment of three thousand dollars, with interest from my death, payable at the death of the said Mildred A. Barclay, to my personal representatives, for the benefit of my estate, or the legatees or devisees thereof. 4. Subject to the said charge for the payment of three thousand dollars, with interest from my death, and payable at the death of the said Mildred A. Barclay, I devise the said lands, after her death, to the children of the said Mildred A. Barclay then living, and the descendants of any deceased child or children; such descendants representing such deceased child or children, and taking the share or shares which such deceased child or children would take, if any." The attesting witnesses to this will were Alma Barclay and Nina Barclay, who were the children of Mrs. Mildred A. Barclay, therein named; and the will was admitted to probate on their testimony as attesting witnesses. The bill charged that the will was not valid, and was not legally executed, and ought not to have been admitted to probate, because the attesting witnesses, being devisees under it, were not competent to attest it as witnesses, nor competent to prove it; and the complainants therefore prayed that the probate might be set aside, and the decedent's estate be administered and settled as in case of intestacy.

The defendants jointly demurred to the bill, and assigned

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the following causes or grounds of demurrer: "1. Complainants admit, in and by their said bill, the due execution and publication of said will, except for the incompetency of the attesting witnesses because of interest; while the copy of said will, made a part of said bill as an exhibit, shows that they are not legatees or devisees under it. 2. Complainants admit, in said bill, the due execution, publication, and probate of said will, except as to the competency of the attesting witnesses to prove it because of interest, and it does not allege that they were parties to the proceeding to probate it. 3. The bill does not show that the attesting witnesses had any direct, certain, or vested interest under the will. 4. The bill shows that the attesting witnesses have no direct, certain, or vested interest under the will." The chancellor overruled the demurrer, and his decree in that behalf is now assigned as error.

CABANISS & WARD, for the appellants.—1. Independent of statutory provisions, the attesting witnesses would be competent under the rules of the common law. They are the children of Mrs. Kumpe (formerly Barclay), but not children living at her death, and may never be such. The devise to them is a contingent remainder of the fourth class—where the persons to whom it is limited are not ascertained, or not in being.—1 Bla. Com., book 2, ch. 11; *Williamson v. Mason*, 23 Ala. 488, 503; *Elmore v. Mustin*, 28 Ala. 309. At common law, a remote, contingent, or uncertain interest, did not disqualify a witness.—1 Greenl. Ev. § 408; *Poe v. Dorrah*, 20 Ala. 288; *Melvin v. Melvin*, 6 Maryland, 541.

2. Prior to the act of 1806 (Clay's Digest, 596, § 1), a legatee was competent to attest the will: he did not become interested until the death of the testator, and then, on releasing his legacy, he might prove the will.—*Shaffer's Lessee v. Corbitt*, 3 H. & McH. 532; *Wyndham v. Chetwynd*, 1 Burr. 417. Under that statute, a legatee or devisee was competent as an attesting witness, but his legacy or devise was declared void; and this provision was carried into the Code of 1852 (§ 1608), and continued of force until expressly repealed by the act approved February 14, 1867, which also repealed all other sections relating to the competency of witnesses in particular cases. This change in the law left the attesting legatee or devisee competent to prove the will, without forfeiting his interest under the will; and it was so held in the case of *O'Neal v. Reynolds*, 42 Ala. 197. This statute is embodied in the Code of 1876 (§ 3058), with this construction noted. This amounts to a legislative adoption of that construction; and on principles of public policy it should be

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upheld and sustained.—*Hardigree v. Mitchum*, 51 Ala. 151; *Ohio Life Insurance Co. v. Deblt*, 16 Howard, 432; *Guelpcke v. Dubuque*, 1 Wall. 175; *Havemeyer v. Iowa City*, 3 Wall. 294; *Thompson v. Lee County*, 3 Wall. 327; *Mitchell v. Burlington*, 4 Wall. 270; *Olcott v. Supervisors*, 16 Wall. 678; 1 Kent, 476; 55 N. Y. 521.

3. The case of *O'Neal v. Reynolds*, *supra*, is not inconsistent with *Stallings v. Hinson*, 49 Ala. 92, nor with any of the subsequent decisions of this court. The two are reconcilable. The probate of a will is not a suit for or against the estate, but a contest as to the disposition of it. The estate is equally whole and intact, whether the heir or the legatee gets it. The assets of the estate can be neither increased nor diminished by the result of the contest or proceeding. It is not a contest by or against the estate, but between the claimants to it; not between a living person and a decedent's estate, but between living persons.—*Shailer v. Bumstead*, 99 Mass. 112, 130; *Garvin v. Williams*, 50 Mo. 212; 26 N. Y. 277; *Booth's Executor v. Vanarsdale*, 9 Bush, Ky. 717; *Milton v. Hunter*, 13 Bush, Ky. 163; *Freeman v. Spalding*, 2 Kernan, 372; *Sawyer v. Smith*, 8 Mich. 411.

4. The amendment of the act of 1867, by the act approved March 2, 1875, as carried into the Code of 1876 (§ 3058), can not affect the case. It does not enlarge the class of excluded witnesses, but extends the restraint upon the excluded class. Each statute abolishes incompetency generally, but with an exception; and each exception excludes the same class, specifying who shall be excluded, when they shall be excluded, and from what they shall be excluded. The only change is, not as to whom, but as to when, and from what the exclusion shall apply.

D. P. LEWIS, *contra*.—1. The witnesses to the will take a vested remainder in the lands devised to Mrs. Barclay for life.—4 Kent. 202, and authorities cited.

2. A party in interest, though not a party to the record, is within the spirit and meaning of the exception to the statute (Code, § 3058), and incompetent to testify to any transaction with, or statement by any deceased person, whose estate is interested in the result of such suit. The exception has been applied to a great variety of cases—to donees of property from the decedent; to creditors of the estate; to the assignors of claims against the estate; to debtors of the estate; to indemnitors of debtors; to heirs and distributees of the estate; and whenever the purpose of the testimony is to diminish the rights of the decedent, or of those claiming in succession to him, or to increase the distributive interest

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of the witness in the estate.—*McLemore v. Nuckolls*, 37 Ala. 662; *Kirksey v. Kirksey*, 41 Ala. 626; *Stuckey v. Bellah*, 41 Ala. 700; *Waldman v. Crommelin*, 46 Ala. 580; *Stallings v. Hinson*, 49 Ala. 92; *Lewis v. Easton*, 50 Ala. 471; *Key v. Jones*, 52 Ala. 238; *Drew v. Simmons*, 58 Ala. 463; *McCravey v. Rash*, 60 Ala. 374.

3. The exception is in the nature of a statute against frauds and perjuries. It excludes a witness whose testimony relates to transactions with, or declarations of a deceased person, against whose estate the witness asserts a claim.—*Stuckey v. Bellah*, 41 Ala. 706; 13 Ohio, 525; 27 Vermont, 628; 9 Gray, 440; 11 Gray, 130; 2 Allen, 328; 64 Barbour, 189; 39 Barbour, 516.

4. The common law declares that a witness can not prove a will, when he derives a legacy under it, either for himself, or for his wife.—2 Redfield on Wills, §§ 3, 4; 1 *Id.* 256-7, ed. 1869; 2 Stra. 253; *Walker v. Walker*, 34 Ala. 469. The law neither permits the heir to defeat, by his testimony, a will which divests him of his ancestor's estate; nor a devisee to establish, by his own testimony, a will which gives the property to him.—64 Barbour, 189.

5. Under the decisions of this court, the subscribing witnesses are permitted to sign the testator's name to the will for him.—29 Ala. 539; 36 Ala. 496; 35 Ala. 687. If by their own testimony they may also establish the will, unscrupulous persons may possess themselves of estates, to the disinheritation of heirs and distributees.

6. The estate "is interested in the result," whenever the assets in the hands of the legal representative, executor or administrator, heir or devisee, are increased or diminished; or when the amount to be derived by the witness, or by his wife, is increased by his testimony. The statute is designed to protect the property and assets of decedents' estates, in whose hands soever it may be by law devolved.

BRICKELL, C. J.—The gift over to the *then living children* of Mrs. Barclay, on the termination of her estate for life, is a vested, as distinguished from a contingent remainder. "It is," says Ch. KENT, "the present *capacity* of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder." The death of Mrs. Barclay could happen, before the death of any of her children; and if it did, the gift in remainder would immediately vest in possession.—4 Kent, 232. Her children, consequently, have a direct, immediate interest in any suit or controversy,

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involving the validity of the will; and, according to the rules of the common law, would be incompetent witnesses in such suit or controversy.

The English statute of wills, 29th Car. 2, required that wills of real estate should be attested by three or four credible witnesses. The term *credible* was held to mean *competent*; and it was construed that the witness must be *competent* at the time of the attestation. If not then *competent*, the attestation was a nullity, and by no machinery, either of release or assignment, could the witness render himself *competent*. It was the policy of the common law, as far as possible, to remove from witnesses all temptation to bias or perjury. It was inconsistent with this policy to allow a will to be established or supported by the testimony of persons taking benefits under it. A will, written or prepared by a legatee or devisee, was, and is, regarded with jealousy, not to say suspicion. Attesting witnesses, it was said, were called around the testator, to ascertain and testify to his sanity, to guard him from fraud, imposition, or undue influence. Therefore, the common law, if there were not, without the devisee or legatee attesting the execution of the will, a sufficient number of subscribing witnesses without interest and competent, sacrificed, not the gift or devise to the attesting witness, but the whole will: there was no gift or devise, which could disappoint the heir-at-law of his inheritance, or the next of kin of the shares which the statute of distributions appointed them to take. Inconvenience resulted from the holding of wills of freeholds to be invalid because of the interest of a subscribing witness. Legislation intervened, and the statute of 25 Geo. 2 was passed, which deprived the devisee or legatee of his interest or benefit under the will; and by the deprivation, removing temptations to fraud or perjury, springing from interest, rendered him a competent attesting witness.

The statutes of 29 Car. 2, and 25 Geo. 2, were substantially re-enacted here in 1806.—Clay's Digest, 596, §§ 1-8. The effect of the statute was, that a devisee or legatee, who was an attesting witness, was competent to prove its execution, so far as he was not a beneficiary of the testator's bounty. *Perkins v. Windham*, 4 Ala. 634. These statutes were carried into the Code of 1852; and that which, by declaring the gift to him void, rendered competent a devisee or legatee who was a subscribing witness, formed section 1608 of that Code.

For many years, there was a tendency in our legislation to enlarge the competency of witnesses, and to remove interest in the event of a cause, as a disqualification. Statutes were enacted, which rendered the plaintiff, in certain

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actions, not involving more than a specified amount, a competent witness, unless the defendant on oath controverted his evidence. The Code of 1852 removed infamy arising from a conviction of crime (other than perjury or subornation of perjury), as a disqualification; and also interest in the event of a suit, or a liability for costs, unless the verdict and judgment would have been evidence for the witness in another suit.—Code of 1852, § 2302. This was followed by the act of February 14, 1867, which provided that, “in suits and proceedings before any court or officer in this State, other than criminal cases, there shall be no exclusion of any witness, because he is a party, or interested in the issue tried; except that, in suits or proceedings by or against executors or administrators (as to which a different rule is not made by the laws of this State), neither party shall be allowed to testify against the other, as to any transaction with, or statement by the testator, or intestate, unless called to testify thereto by the opposite party.” This act repealed, by reference, numerous statutes rendering parties and witnesses having an interest competent, and among others section 1608 of the Code of 1852, relating to devisees or legatees who were attesting or subscribing witnesses.—Acts of 1866-7, 435. It was embodied in the Revised Code, and remained of force until superseded by the act of March 2, 1875, which now forms section 3058 of the Code of 1876, and reads: “In suits and proceedings before any court or officer, other than criminal cases, there must be no exclusion of any witness because he is a party, or interested in the issue tried, except that neither party shall be allowed to testify against the other, as to any transaction with, or statement by, any deceased person whose estate is interested in the result of such suit, or when such deceased person, at the time of such statement or transaction, acted in any representative or fiduciary relation whatsoever, to the party against whom such testimony is sought to be introduced.”

These statutes were intended as a revision of the whole subject of the competency of witnesses because of interest, or because of their relation to the suit or proceeding, and to substitute the rule prescribed by them, not only for the rules of the common law, but for the provisions of the former statutes which are expressly repealed by the act of 1867. The great purpose being to enlarge the competency of witnesses, to remove interest, or relation to the suit or proceeding, as a disqualification, it cannot be supposed that, by repealing the statute which rendered devisees or legatees competent attesting witnesses of a will, it was intended as to them the common law should be revived, and their exclusion

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and the sacrifice of the whole will accomplished. That statute was repealed, because, without a deprivation of the gift to them, they were rendered competent witnesses by the general words of the new enactment, with which it was inconsistent. There is by the new statutes a removal of all the disabilities of parties, or privies, or of others, because of interest, or because of the use which may be subsequently made of the verdict or judgment. There is an exclusion only of evidence of a particular character—*of transactions with, or statements by, any deceased person, whose estate is interested in the result of the suit.* The reason of the exception of evidence of this character, it has often been said, is, “that when there is no mutuality, there should not be admissibility—i. e., when the lips of one party to a contract are closed by death, then the other party should not be heard as a witness.”—1 Whart. Ev. § 463.

An original proceeding in the Court of Probate, for the probate of a will, is a proceeding *in rem*. The purpose is to ascertain the *status* of the estate of the decedent, and the condition in which he died, whether testate or intestate. It does not assume the form, and is not a suit *inter partes*, until the heirs or distributees intervene in the mode prescribed by the statute.—*Allen v. Prater*, 35 Ala. 169; *Clemens v. Patterson*, 38 Ala. 721; *Leslie v. Sims*, 39 Ala. 161. The character of the suit is not changed, if there is no contest in the Court of Probate, and the heir-at-law, or next of kin, resort to the statutory remedy by bill in chancery. That remedy stands in the place of, and is the substitute for proof of the will in solemn form, as practiced in the ecclesiastical courts; or, if the will is of real estate, the action of ejectment at common law.—*Johnston v. Glasscock*, 2 Ala. 236. In either proceeding—the contest in the Court of Probate, or by bill in a court of equity—the parties claiming under the will are in fact the *actors*, bound to support it affirmatively, while the heir, or next of kin, is in the relation of a defendant.—*Johnston v. Glasscock*, *supra*. In either court, the controversy is between living parties. The *estate of the testator* is not interested. The interests of those claiming to succeed to it, either by operation of law, or by operation of the instrument propounded as a will, are alone involved. The estate remains intact, undiminished, whatever may be the result of the controversy, and the subject-matter of investigation is not a *transaction with, or statement by the decedent*, but an act of his in its nature ambulatory and revocable, taking effect only by his death.—*Shailer v. Bumstead*, 99 Mass. 130; *Jones v. Larrabee*, 47 Me. 474; *Sawyer v. Smith*, 8 Mich. 411. Upon all questions involved, the parties are competent witnesses—

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competent as attesting witnesses, though devisees or legatees—competent to prove any fact which may be involved in the real issue, whether there is a will or not.—*Garvin v. Williams*, 50 Mo. 206. Such is the policy and purpose of the statutes, which are remedial, and must be so construed that this policy is accomplished.—*O'Neal v. Reynolds*, 42 Ala. 197.

The sole question involved in the demurrer is the competency of the devisees in remainder, as attesting witnesses. We are of the opinion they were competent. The decree overruling the demurrer must, therefore, be reversed, and the cause remanded.

Cook, adm'r &c. v. Parham & Blunt.

Bill in Equity for Foreclosure of Mortgage.

1. *When mortgagee is purchaser for valuable consideration.*—When a mortgage is taken merely as security for a pre-existing debt, without an extension of the day of payment, or any new consideration, the mortgagee is not regarded as a purchaser for valuable consideration, nor entitled to protection against prior equities of which he had no notice; *secus*, when the consideration is a debt contemporaneously contracted, or the extension of a pre-existing debt.

2. *Assignment of debt and mortgage by heirs (or devisees) of mortgagee.*—A conveyance of the mortgaged premises, by the heirs (or devisees) of the deceased mortgagee, to the wife of the mortgagor, operates in equity as an assignment of the secured debt; and their assignment of the secured debt to her, whether they have the legal title or not, passes an equity against all the world, except creditors whose rights are affected: a stranger can not be heard to question the validity and effect of such assignment.

3. *Presumption of satisfaction of mortgage.*—A mortgage will not be presumed to be satisfied, merely from the lapse of twenty years before filing a bill to foreclose it, when partial payments were made on the debt, and it was reduced to judgment, before the lapse of twenty years.

4. *Conclusiveness of judgment.*—A judgment against the mortgagor, rendered prior to the execution of the mortgage, binds the mortgagee as a privy, and is conclusive as to all defenses which might have been urged against the claim on which it is founded.

5. *Attorney's authority after client's death.*—An admission of a mistake in the amount of a judgment, and a consent to its correction, made and given by the plaintiff's attorneys of record after his death, are not within the line of their authority.

6. *Rents and profits; when not charged against mortgagor's widow.*—When the mortgagor dies in possession of the mortgaged premises, his widow is entitled to remain in possession, taking the rents and profits, until her dower is assigned, or until the mortgage is foreclosed; and she will not be charged with rents and profits, as a mortgagee in possession, at the suit of another mortgagee, because she took an assignment of the mortgage after her husband's death.

APPEAL from the Chancery Court of Lowndes,
Heard before the Hon. H. AUSTILL.

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The original bill in this case was filed on the 10th August, 1871, by John G. Parham and Beverly Blunt, partners doing business under the firm name of Parham & Blunt, against the administrator, widow, and children of Harry W. Adams, deceased; and sought to foreclose a mortgage on a tract of land, executed by said Adams in his life-time. The mortgage was dated the 16th March, 1866, and purported to be given to secure the payment of a promissory note for \$2,032.91, of even date with the mortgage, and payable on the 1st November, 1866, to the order of J. F. Johnson & Co. The firm of J. F. Johnson & Co. was composed of J. F. Johnson, of Montgomery, Alabama, and R. K. Walker and Thomas McKnight, of the city of New Orleans; and after its dissolution, by the withdrawal of said Johnson, Walker and McKnight transferred the debt to said Parham & Blunt, by an instrument of writing, dated December 13, 1869, in these words: "For and in consideration of the sum of \$2,500, owing and due by R. K. Walker & Co. to Mess. Parham & Blunt, we hereby sell and transfer to said Parham & Blunt a certain debt we have and own against H. W. Adams, of Lowndes county, Alabama; being said Adams's note, secured by mortgage, for about \$2,032, now in the hands of our attorneys, Mess. Cox & Witcher, of Hayneville, Alabama, for collection at law. We authorize our said attorneys to pay over to said Parham & Blunt the proceeds of said claim, when collected, in whole or in part, after deducting fees for collection."

Adams bought the lands, in 1848, from Alfred V. Scott, and took a conveyance in his own name; paying \$700 of the purchase-money in cash, and giving his two notes for the residue, for \$500 and \$1,000 respectively, payable one and two years after date, with a mortgage on the lands to secure their payment; but, for some unexplained reason, this mortgage was either not recorded, or was delivered up and cancelled, and another mortgage executed in its place on the 3d March, 1849. Partial payments were made on these notes; and in 1863, after the death of said Scott, William O. Nixon, as his executor, recovered a judgment on them, against said Adams, for \$2,440, the estimated balance then due. Several executions were issued, from term to term, on this judgment; and in March, 1867, the lands were sold under an execution issued on it, said Nixon becoming the purchaser, and receiving the sheriff's deed. Scott's widow and two children were his only heirs and devisees; and on the death of said Nixon, which occurred in 1868, he devised and bequeathed all his property to them. Adams continued in the possession of the land, with his family, until his death,

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in March, 1870. On the 16th December, 1869, Mrs. Rebecca Adams, his wife, purchased from the widow and children of said Scott the said judgment and mortgage, taking from them a deed and assignment, in these words :

"Know all men by these presents, that we, Alice E. Garnett and A. S. Garnett, her husband, and W. O. N. Scott and Rebecca B. Scott, for and in consideration of the sum of three thousand dollars, of which twenty-five hundred is in hand paid to us, and for the other five hundred Rebecca S. Adams has executed her promissory note, payable to Alice Garnett, on the 20th October, 1870 ; we do hereby bargain, sell and convey, unto the said Rebecca S. Adams, for her sole and separate use, free from all debts, contracts, or control of her present or any future husband, all the right, title and interest, in law and in equity, we have in and to the following described real estate," &c.; "to have and to hold, to her and her heirs, forever ; and we hereby warrant the title hereby conveyed, against the lawful claims of our heirs, or any one claiming under us. Witness our hands," &c.

"For and in consideration of the sum of three thousand dollars, to us in hand paid, we hereby sell and transfer to Rebecca Adams, for her separate, sole, and exclusive use, free from the debts, contracts, and control of her present husband, or any future husband she may have, a certain judgment recovered in the Circuit Court of Lowndes county, by W. O. Nixon, against Harry W. Adams, on the 30th day of April, 1863, for the sum of \$1,000 principal, and \$1,440 interest, besides \$8.90 costs of suit. And in consideration of the aforesaid, we do hereby sell and convey to the said Rebecca S. Adams, for her sole and separate use as aforesaid, a certain mortgage executed by said Harry W. Adams on the 3d day of March, 1849, to Alfred V. Scott, conveying the following real estate as security for the notes, the cause of action in the afore-mentioned judgment, to-wit," &c., describing them. (Signed by the same parties, but without seal or date.)

These facts were set up by Mrs. Adams, in her answer to the bill ; and she further alleged that the \$700, of the original purchase-money to Scott, paid in cash by her husband, was paid by him out of moneys belonging to her separate estate, which she had and owned at the time of her marriage ; that her said husband was at that time insolvent, and so continued up to the time of his death ; and she insisted on her superior title, legal and equitable, under these facts. She alleged, also, that the mortgage to J. F. Johnson & Co. was given to secure a loan of Confederate money, treasury-notes, or bonds, and was therefore without legal consideration, and

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void; and she prayed that her answer might be taken and deemed a cross-bill, and that said mortgage might be annulled and cancelled. An answer was filed by the adult children of Adams, denying the validity of the mortgage set up by the complainants; and formal answers were filed by the administrator and the guardian *ad litem* of the infants.

It was admitted that Martin & Sayre, the attorneys of record, by whom the judgment in favor of Nixon against Adams was obtained, would testify that there was a mistake in the amount for which the judgment was taken, and that it should have been taken for only \$1,604.76, as shown by a statement and calculation contained in a letter which they had written to the defendant's attorneys, dated March 26, 1869; and in which they also consented to the correction of the mistake. J. F. Johnson died in the latter part of the year 1871. A letter which he had written in May, 1871, was admitted in evidence, "subject to all legal objection thereto for relevancy," in which he thus stated the consideration of the mortgage executed to his house by Adams: "The consideration of the mortgage given by Adams was for moneys advanced and loaned to him before and during the war, amounting to about \$10,000, and since the war, at the time the mortgage was executed, a further advance of \$300. The old debt was scaled, and the amount agreed on by us, and the \$300 added to it, making the amount of the mortgage."

On a hearing on pleadings and proof, the chancellor held: 1. That the sale of the lands under the judgment in favor of Nixon was void, and passed no title; and that, even if title passed, it was subordinate to the lien of the complainants' mortgage, because of the stay of execution by plaintiff after the execution of the mortgage. 2. That the purchase-money paid by Adams to Scott, and all the improvements erected on the lands after the purchase by Adams, were paid and made with moneys derived from and belonging to the separate estate of Mrs. Adams; that she (or her administrator, she having died pending the suit) was entitled, under the cross-bill filed by her, to charge the lands with the moneys thus expended by her husband; and that this equity was superior to the lien of the complainants' mortgage, except as to the \$300 loaned or advanced to Adams at the time the mortgage was executed. 3. That the heirs and devisees of Scott must be held to have acquired the note and mortgage in due course of administration; that their conveyance and assignment passed their interest to Mrs. Adams, and that this lien was superior to that of the complainants' mortgage. 4. That the mortgage to Scott was not barred by the statute of limitations. 5. That Mrs. Adams, or her estate, holding the

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first mortgage, should be charged, in favor of the complainants, as second mortgagees, with the reasonable rent of the land each year after the second mortgage was given. He ordered a reference to the master, and directed him to state an account in accordance with these principles.

At a subsequent term, after the register's report was made, the chancellor modified his former decree, and held that the complainants' equity, under the mortgage to J. F. Johnson & Co., was superior to any lien or equity set up by Mrs. Adams, except as to the amount due on the mortgage to Scott, held by her; and that she should be charged, as a mortgagee in possession, with the rents of the land each year, and allowed a credit for taxes paid, &c. The account being restated under this decree, a final decree was rendered, allowing to the estate of Mrs. Adams, on the mortgage assigned to her, the sum of \$1,017.37, to be first paid out of the proceeds of the sale of the land; and directing the lands to be sold by the register, and the amount due on the complainants' mortgage to be paid out of the proceeds, after deducting the amount thus allowed to her estate.

The appeal is sued out by the administrator of Mrs. Adams, and each ruling of the chancellor against her, as above stated, is assigned as error.

GIRARD COOK, and CLOPTON & GRIFFIN, for appellant.

WATTS & SONS, W. K. HAUGHTON, and R. M. WILLIAMSON, *contra*.

(No briefs have come to the hands of the Reporter.)

BRICKELL, C. J.—A mortgagee, taking a mortgage as security for a pre-existing debt, is not a *bona fide* purchaser for a valuable consideration, protected against prior equities of which he has no notice.—*Boyd v. Beck*, 29 Ala. 703. But, if the mortgage is security for a debt presently contracted, the security enters into the consideration on which the credit is given, and the mortgagee will stand in the relation of a purchaser entitled to protection against equities of which he has no notice. In this case, a part of the consideration was a debt contracted presently, and a pre-existing debt, founded on a consideration of Confederate notes, which was reduced in amount to a sum agreed upon as their actual value, and the day of payment extended—in effect, the old debt was extinguished, and a new one created. The general rule, that priority in point of time gives priority in point of right, prevails alike in courts of law and equity. The whole theory

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upon which protection is afforded a purchaser, against prior equities of which he has no notice, is, that in reliance upon the legal title he has parted with a consideration of value, or divested himself of some legal right, or been induced to change his condition, so that a deprivation of the legal title would work him injustice. His equity, though younger in point of time, is equal in conscience to the older equity with which it may be intended to burden the legal estate. Courts of equity, therefore, refuse to interfere against him. The extinguishment of the pre-existing debt, not a mere change in its form; the creation of a new debt, founded on a new consideration, giving a new day of payment, brings the mortgagees in the relation of *bona fide* purchasers, who are entitled to protection against the resulting trust asserted by Mrs. Adams.—*Schempert v. Dillard*, 55 Miss. 361; 1 Jones on Mortgages, §§ 458-9. It is not necessary, therefore, to consider whether the evidence establishes the existence of the trust.

The conveyance by the heirs or devisees of Scott, to Mrs. Adams, of the premises embraced in the mortgage to their ancestor, executed by Adams in 1849, would, in a court of equity, operate an assignment of the debt secured by the mortgage.—*Welsh v. Phillips*, 54 Ala. 309. Independent of that conveyance, there was a separate assignment of the debt. True, the personal representative does not join in the assignment. He had died before it was made; and it is but a fair presumption, when distributees or legatees are found controlling choses in action which were assets, in the absence of an administration, after the lapse of several years from the death of the ancestor, that their possession is rightful, and that they are clothed with the legal title. That title they can acquire by a transfer from the personal representative, or by a distribution in the Court of Probate. But, whether they had the legal title or not, their assignment would pass an equity, which would prevail, unless there were creditors whose rights were affected. No creditors are shown to exist, and it is not for a stranger to question the validity and effect of the assignment.

There is no room for a presumption of payment of this debt. Judgment was obtained upon it in less than twenty years after its maturity, and payments were made upon it, which repel such a presumption, though more than twenty years had elapsed before the filing of the cross-bill to foreclose it. The judgment having been rendered before the mortgage to the appellees, they are bound by it as privies of the mortgagor.—*McClelland v. Ridgway*, 12 Ala. 482; *Crow v. Hudson*, 23 Ala. 393. It was conclusive of the rights of

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the parties, and fully determined all defenses, whether of prior payments or otherwise, which could have been urged against the debt.—*Mervine v. Parker*, 18 Ala. 241; *Burt v. Hughes*, 11 Ala. 571; *DeSylva v. Henry*, 3 Porter, 132. A concession that the judgment was, by mistake, rendered for a larger sum than was due, would not avail the appellees, unless the finality and conclusiveness of the judgment was impaired. The admission of the mistake, and a consent to its correction, made and given by the attorneys of record, subsequent to the death of the plaintiff, was not within the line of their authority. The chancellor was, therefore, in error in not allowing the amount of the judgment as the mortgage debt.

The liability of a mortgagee in possession for rents and profits, and his duty to apply them in reduction of the mortgage debt, may be admitted. But there is no room for considering Mrs. Adams as a mortgagee in possession. Her possession was a mere continuation of that of her husband, and she was entitled to remain in possession, taking the rents and profits, until her dower was assigned, or there was a foreclosure of the mortgage.—*Boynton v. Sawyer*, 35 Ala. 497. There was error, therefore, in charging Mrs. Adams with rents.

For the errors we have pointed out, the decree must be reversed, and the cause remanded.

STONE, J., not sitting.

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Detinue for Mule.

1. *Declarations of agent; admissibility against principal.*—The declarations or statements of an agent, having authority only to demand and receive from the defendant the property sued for, made to third persons, after a refusal to deliver by the defendant, in derogation of the title of plaintiff, his principal, are not competent evidence against plaintiff.

2. *Exception to exclusion of evidence.*—An exception to the exclusion of evidence can not be sustained, when the nature or substance of the excluded evidence is not so set out as to show error on the part of the court, or prejudice to the party excepting.

3. *Charge tending to confuse or mislead.*—Where two witnesses testify as to the contents of a writing, which is not produced, and their testimony is conflicting, the court may properly refuse a charge which, in effect, would proba-

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bly produce on the minds of the jury the impression that they should give greater weight to one than to the other.

4. *Exception to additional charge to jury.*—An exception to additional instructions to the jury, given by the court on their returning an incomplete verdict, must be taken before the jury retire again, and comes too late after they have brought in their final verdict.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. LOUIS WYETH.

This action was brought by Henry F. Temple and Joseph F. Shipp, as partners under the firm name of "Southern Pump and Pipe Company," against Benjamin F. Bynum, to recover a mule, together with damages for its detention; and was commenced on the 8th January, 1877. It appeared from the evidence adduced on the trial, as set out in the bill of exceptions, that the plaintiffs conducted their business in Chattanooga, Tennessee; and that one McKendree, under whom defendant derived title to the mule, was engaged, during the years 1875 and 1876, in selling their pumps throughout Jackson county, under a written agreement between them, which was made an exhibit to the deposition of said Shipp, taken on the part of plaintiffs. In his answer to the 5th interrogatory, said Shipp testified: "The said McKendree did have in his possession a wagon and team belonging to us, which he leased, and took possession of, January 13, 1875. He remained in possession until May, 16, 1876, when we sent a man to his house after the wagon and team, and, to our surprise, he came back without the property. The contract, under which he obtained possession of the mules and wagon, was in writing, and is in the possession of our attorneys, Messrs. Hunt & Tally, and will be exhibited on the trial of this cause." One of said attorneys testified on the trial, "that said contract was in fact placed in their hands by said Shipp, but the same had been lost, and witness could not undertake to state its contents." In reference to this contract, McKendree, whose deposition was taken on the part of the defendant, thus testified: "I obtained the mule from a gentleman representing himself to be, as I remember, J. F. Temple, who delivered me the mules, wagon, and fixtures, to work for the said company, with the understanding that I was to pay \$500 for the whole; but, if I failed to do so, I was to pay a stipulated price per month—\$30, I think, was the amount agreed on." "I had the mule in my possession, with the privilege of purchasing, and had, as I understood from Mr. Shipp, who, I was told, was the owner of the mules, the privilege of disposing of them, if I saw proper; the impression being made upon me, by them, that there would be no doubt I would be able to meet all

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liabilities, as I was doing at the time a prosperous business." It appeared that McKendree had never paid for the wagon and team, but he traded the mule now sued for to one Dean, for a stallion, which died a short time afterwards; and Dean, after keeping the mule twelve months, sold it to the defendant.

"In the progress of the cause, plaintiffs introduced as a witness Samuel H. McMahan, sheriff, &c., who testified, that he had in his possession, for collection, a lot of notes belonging to the plaintiffs; that one Whitesides, representing plaintiffs, came to him with the receipt he had given for the notes, and witness paid him the money he had collected on the notes; that he went with said Whitesides, at his request, to see the defendant, who had the mule; that Whitesides claimed the mule, as the property of plaintiffs, and defendant insisted on his right to retain it under his purchase from Dean; that Whitesides left defendant without obtaining the mule; that subsequent to this, and before the commencement of this suit (it appeared on cross-examination of said witness), witness had held repeated conversations with said Whitesides, in regard to plaintiffs' right to the mule, while said Whitesides was seeking to procure the surrender of the mule from the defendant; and that Whitesides was the person who instituted this suit for the plaintiffs. Witness having stated that Whitesides had made declarations or statements to him, touching the matter of plaintiffs' and said McKendree's right to the mule, defendant sought to introduce the same as evidence for him; but plaintiffs objected, and the court sustained the objection, and declined to permit the introduction of the statements of said Whitesides as evidence in this cause. To the refusal of the court to permit the defendant to prove admissions or declarations of said Whitesides, in disparagement of plaintiffs' right to the mule, defendant objected and excepted, as improper and prejudicial to him under the facts and circumstances of the case as then shown."

The bill of exceptions concludes thus: "This was all the evidence in the case; and on this statement of the facts, the court charged the jury, generally, the law applicable to the case; and no exceptions were reserved to the charge. Defendant then requested the court to charge the jury, in writing, as follows: 'If the jury find, from the evidence, that the contract in regard to the mule was in writing, and that the writing has been lost, then it was incumbent on the plaintiffs to show the contents of said writing; and in its absence, or in the absence of the proof of the contents, it is right that the jury should look to the evidence in this case; and if they

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find one sole witness as to the contract of sale, then they will be authorized to look to that evidence.' The court refused to give this charge to the jury, and the defendant excepted to its refusal."

"The jury returned, in the first instance, a verdict in substance as follows: 'We, the jury, find for the plaintiffs, and assess their damages to one hundred dollars.' The court then instructed them, that in this action, if they found for the plaintiffs, their verdict should assess the value of the mule, and such damages for the detention as they thought right. The jury then retired, and soon returned with a verdict," finding the issue in favor of the plaintiffs, assessing the value of the mule at one hundred dollars, and the damages for its detention at ten dollars." "After the jury had rendered this verdict, one of the defendant's counsel remarked, that he desired the court to take notice that he excepted to the instructions given to the jury as above stated; to which the court replied, that he desired the counsel to take notice that no exception was made to the instructions until after the jury had returned their verdict."

The several rulings of the court to which, as above shown, exceptions were reserved by the defendant, are now assigned as error.

ROBINSON & BROWN, with WATTS & SONS, for appellants.

HUNT & TALLY, and J. C. COULSON, *contra*.

MANNING, J.—There was no error in the refusal of the court to permit the conversations of Whitesides to be introduced, in regard to the right of plaintiffs to the mule sued for. Whitesides was, apparently, only an agent to demand and get the mule for plaintiffs, from the defendant. This was not such a relation as authorized proof to be made of what he had said in conversations with others, of the claim of plaintiffs, if he had said any thing in derogation of their right of property. Nor does it seem to have been indicated to the court, what it was supposed to have been said by Whitesides, that it was proposed to prove. It does not, therefore, appear that defendant was prejudiced by the exclusion of the testimony, or that the court erred in excluding it. The proposed examination, so far as is shown, may have been merely a "fishing" for evidence that did not exist.

According to the bill of exceptions, "the court charged the jury, generally, the law applicable to the case; and no exceptions were reserved to the charge." But the judge

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refused to charge, at the request of defendant, "If the jury find, from the evidence, that the contract in regard to the mule was in writing, and that the writing had been lost, then it was incumbent on the plaintiffs to show the contents of said writing; and in its absence, or in the absence of the proof of the contents, it is right that the jury should look to the evidence in this case; and if they find one sole witness as to the contract of sale, then they will be authorized to look to that evidence." The fault of this charge is, that it would tend to confuse the jury. It would be their duty to look to all the evidence before them, whether the supposed contract was lost, or its contents proved, or not proved. But the impression the instruction asked would have probably made, is that, if the plaintiffs' witness, Shipp, in his evidence, that by the written contract there was only a hiring of the mules and wagon to McKendree, and according to McKendree's testimony, there was, besides, a conditional contract of sale, they must give the greater weight to McKendree's testimony. This would have been error, and the court did right in refusing it.

If there was any error in the instruction of the court to the jury, when they returned the first time, with an incomplete verdict, that they should complete it, by a finding in respect to damages for the detention of the mule, no objection, or exception, was then made to that instruction, and it is not therefore subject to revision here.

Let the judgment be affirmed.

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Bill in Equity for Settlement of Partnership Accounts.

1. *Partnership inter sese; when created.*—When the rights of third persons, who have dealt with parties associated in business, are concerned, a partnership may arise by mere operation of law, being implied from a community of profit and loss, even in opposition to the expressed intention of the parties themselves; but, as between the parties themselves, the question whether a partnership exists is one of intention; and when their agreement has been reduced to writing, the intention must be collected from the words of the instrument, construed in the light of the circumstances surrounding the parties when they entered into it, the occasion which gave rise to it, and the objects to be accomplished by it.

2. *Same.*—A written agreement, signed by C., H., and E., which recites that C. "is desirous of enlarging and extending his present commission business, and desires to engage the services of H. and E.", and that the parties "therefore enter into the following agreement;" and which then provides—

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1st, "that C. is to invest a capital of \$10,000 in the business," which is to be conducted at Selma, in the name of C. & Co., "and is to be allowed eight *per cent.* interest on all funds he invests in said business;" 2d, that he "is to employ the services of E., at a salary of \$1,500 *per annum*, and all other help needed in said business;" 3d, that "for the influence and business qualifications of H., said C. agrees to give him the half of the net profits of said business, after all expenses are paid;" 4th, that C. is not to draw out any part of the \$10,000 invested by him in the business, until the day specified for its termination, "at which time he is to pay said H. his half of the net profits of said business, if any;" 5th, that each of the three parties agrees to give his whole time and attention to the business, H. further agreeing to pay half of all the losses the business may sustain, if any,—creates a partnership between C. and H., as between themselves.

3. *Stating account on settlement of partnership.*—When the articles of partnership bind each partner to devote his whole time and attention to the common business, and, on settlement of the partnership accounts in equity, one of the partners is charged with a sum of money which he agreed to pay for the privilege of undertaking an agency for a third person outside of the partnership business, the amount so charged should be credited to the partnership, and not to the other partner individually.

4. *Parol evidence ; when not admissible to vary writing.*—A writing which is complete in itself, and which was executed with deliberation, is the sole memorial of the contract between the parties, and all prior negotiations are presumed to have been merged in it; and in the absence of fraud, or mistake, its terms can not be varied by parol evidence.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. CHARLES TURNER.

The bill in this case was filed on the 6th August, 1875, by Noadiah Woodruff, as the assignee of Oscar F. Harrell, against Wilson H. Couch and the said Harrell, to compel a settlement of the accounts of a partnership alleged to have existed between the said Couch and Harrell. The articles of agreement between the said parties, as made an exhibit to the bill, and the assignment by Harrell to the complainant, were in these words:

"State of Alabama, County of Dallas, City of Selma; December 29th, 1870. Know all men by these presents, that whereas W. H. Couch is desirous of enlarging and extending his present commission business, and desires to engage the services of O. F. Harrell and W. M. Ethridge; we, the undersigned, this day enter into the following agreement, until the first of January, 1872: 1. Said Couch is to invest a capital of \$10,000 in said business, and conduct it in Selma, in the name of W. H. Couch & Co.; and he is to be allowed eight per cent. interest on all funds he invests in said business. 2. He is to employ the services of W. M. Ethridge, at a salary of \$1,500 a year, and all other help needed in said business. 3. For the influence and business qualifications of said O. F. Harrell, said Couch agrees to give him the half of the net profits of said business, after all expenses are paid. 4. Said Couch is not to draw out any of said capital of \$10,000, until January 1st, 1872; at which time, he is to pay said

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Harrell his half of the net profits of said business, if any. 5. Said Couch, Harrell and Ethridge agree to give their whole time and attention to the promotion of the interest of the above named business." (Signed by W. H. Couch, O. F. Harrell, and W. M. Ethridge, and attested by Robert A. Nicoll.)

"Selma, Ala., Dec. 29th, 1870. This is to certify, that whereas W. H. Couch has this day engaged my services in the commission business, until the first of January, 1872, for the half of the net profits of the said business, I hereby agree that, if said business sustains a loss in conducting it, I am to pay the half of said loss." (Signed by O. F. Harrell, and attested by W. M. Ethridge.)

"For value received, I transfer the within agreement, and all my rights and equities therein, and all moneys due me in virtue thereof, to Noadiah Woodruff, this 10th December, 1874." (Signed by O. F. Harrell.)

The bill alleged that the business of the partnership was carried on until on or about the 1st January, 1872, when the partnership expired by limitation; that its net profits amounted to about \$6,000; that Couch withdrew from the partnership, in violation of the articles of agreement, more than one half of the amount which he had put in; that he had possession of the partnership books and accounts, and refused to let Harrell and the complainant have access to them, and denied his liability to account.

A decree *pro confesso* was taken against Harrell. Couch answered the bill, admitting the execution of the articles of agreement, but denying that they created a partnership between him and Harrell. He denied that the business was conducted successfully, or had earned any profits above expenses. He alleged that Harrell had not devoted his whole time and attention to the business, and that, in May, 1871, he had undertaken a general agency for Mrs. M. M. Craig, in the management of a large plantation, and in the purchase and sale of valuable lands; that this business required a great deal of his time and attention, and he expected to reap great profit from it; and that, in order to procure respondent's consent to his undertaking this agency, Harrell promised to pay him \$1,000 out of his share of the profits of their common business. He alleged that the agreement between himself and Harrell originated in Harrell's application to him for employment; that Harrell proposed, as an inducement to his employment by respondent in said business, that he would put in the business \$3,000, or \$3,500, and would "turn over" fifteen hundred bales of cotton, to be sold on commission by respondent's house; that when the

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agreement was reduced to writing, he objected to incorporating these stipulations, through fear of his creditors, and therefore they were omitted; that the words "*& Co.*" were inserted in the name of the house, at the instance of Harrell, in order to induce his former customers to believe that he was a partner; and that Harrell never complied with his promises, as to the money and cotton, though often requested to do so.

The complainant took the deposition of Harrell, and the defendant Couch took the depositions of W. M. Ethridge and himself; and the cause was submitted for hearing on bill and exhibits, answer, and these depositions. The chancellor held, that the agreement created a partnership between Couch and Harrell, and that the complainant was entitled to an account of the partnership transactions; and he therefore ordered a reference to the register, as master, "to take and state an account of said partnership transactions between said parties, under the contract of partnership, as shown by the instrument of writing attached to the bill as an exhibit, as modified by the subsequent agreement between the parties, shown in the testimony of Couch and Ethridge, to the effect that said Harrell should take charge of the business of Mrs. Craig, and pay to the firm, for his time thus employed, the sum of one thousand dollars."

On the hearing, the chancellor suppressed, on objections by the complainant, several portions of the depositions of Couch and Ethridge, in which they detailed, as in the amended answer of Couch, the negotiations between the parties before their agreement was reduced to writing, and the reasons why the stipulations on the part of Harrell were not inserted in the writing. In reference to the agreement between the parties about Mrs. Craig's business, Ethridge testified: "The original agreement between them was changed in May, 1871. Mrs. M. M. Craig wished Harrell to take a power of attorney, or agency for her, in the management of her farm and finances. As this would require a good deal of his time from the business of said Couch, Harrell asked his permission to take said agency. Upon Harrell's insisting for the privilege, Couch agreed that, if Harrell would pay him \$1,000, he might act for Mrs. Craig. Harrell then offered to pay him \$500, but Couch refused. Harrell then asked for time to go out and see Mrs. Craig; and on his return he agreed to pay Couch the \$1,000, for the time lost in, and the privilege of attending to Mrs. Craig's business; saying, 'he could pay that, and then have a good thing of it.'" The testimony of Couch, in reference to this matter, was substantially the same as that of Ethridge.

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In the account stated by the register, he charged Harrell, in favor of the partnership, with \$1,000, as directed in the decree of reference; and the accounts, as stated by him, showed a balance due to Harrell, from Couch, of \$514.17; but, on exceptions to his report, this balance was reduced by the chancellor to \$461.12, and he rendered a decree for the complainant for that amount. The defendant excepted to that part of the report which charged the item of \$1,000, due from Harrell, in favor of the firm, and insisted that it should have been allowed to Couch individually; but the chancellor overruled the exception, and adhered to his former decision.

The several rulings of the chancellor in suppressing evidence, the decree of reference, in holding that a partnership existed between the parties, the overruling of the exceptions to the register's report, and the final decree, are now assigned as error.

REID & MAY, and E. M. VARY, for appellant.—1. The contract between Couch and Harrell did not create a partnership.—*Autrey v. Frieze*, 59 Ala. 587; *Robinson v. Greene*, 5 Harr. Del. 115; *Chisholm v. Cowles*, 42 Ala. 180; *Hazard v. Hazard*, 1 Story, 371; *Parsons on Partnership*, 58, note d; *Bailey v. Clark*, 6 Mass. 374; *Ellsworth v. Pomeroy*, 26 Indiana, 163; *Kerr v. Potter*, 6 Gill, Md. 424; *Emanuel v. Draughn*, 14 Ala. 303; *Belden v. Reed*, 27 La. Ann. 103; *Southern Law Journal*, May, 1878, p. 236. The testimony shows, very clearly, that the parties never intended to form a partnership, and never supposed that they had done so; and as the question is presented, it is wholly one of intention.

2. Aside from the question of partnership, the evidence establishes an express agreement by Harrell to pay Couch individually \$1,000, for the privilege of attending to Mrs. Craig's business, from which he expected to derive a greater profit to himself. As to this matter, the testimony of Ethridge and Couch is substantially the same, and outweighs the denial of Harrell. It was a private agreement between the parties, and the alleged partnership had no connection with it.

3. The evidence suppressed by the chancellor does not come within the general rule, which excludes parol evidence of stipulations not embodied in the writing, but is within recognized exceptions, as shown by the following authorities: 1 Greenl. Ev., 14th ed., § 284; 1 Brickell's Digest, 865, § 866; 85 Penn. St. 369; 2 Wharton on Evidence, § 1015; *Witte v. Dixon*, in *Law Reporter* for April 17, 1878, p. 466.

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LAPSLEY & NELSON, *contra*. (No brief on file.)

BRICKELL, C. J.—The primary question is, whether, by the agreement of December 29th, 1870, into which Couch and Harrell entered, a partnership between them was created. If there was, a court of equity alone had jurisdiction to decree an account and settlement of the partnership transactions. If there was not, the bill ought to have been dismissed, and the error of entertaining it is fatal to all the proceedings.

In determining whether a partnership was created, we are to consider alone the intention of the parties, as it may be fairly collected from the agreement, and the circumstances attending its execution.—Pars. Part. 58. There is a well-recognized distinction, between cases where third persons are concerned, who have dealt with parties associated in business, and cases where controversies arise between the parties themselves. In the former class of cases, for the protection of strangers, a partnership may arise by mere operation of law, without an inquiry into, or in direct opposition to, the expressed intention of the parties. The general course of decision, founded on the principles laid down in *Waugh v. Carver*, 2 H. Bla. 235 (1 Smith's Lead. Cases, 968), is, that whenever two or more persons agree to combine or unite capital, skill, or labor, for the purpose of trade or business, for their common benefit, and that the proceeds shall be received on their joint account, and distributed among them, as to third persons they will be regarded as partners, although such may not be their intention. There is community of loss, and of profit, and the law implies the existence of a partnership.—Pars. Part. 70-93. In the latter class of cases, the question, as we have said, is one of intention; and when the agreement between the parties is in writing, the intention must be collected from its words, and the circumstances which may be resorted to for aid in its construction—the circumstances surrounding the parties, the occasion giving rise to the contract, and the object to be accomplished.—*Pollard v. Maddox*, 28 Ala. 321.

Couch was entering into a business new to him, in which Harrell had been previously engaged, and had experience, and an acquaintance with the class of the immediate community from whom customers and patrons were expected. The enlargement and extension of the business is the purpose of Couch, explicitly avowed in the first clause of the agreement. The means and methods to be employed are—first, that Couch shall invest a capital of ten thousand dollars, and conduct the business in the name of W. H. Couch

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& Co., being allowed eight per cent. interest on his capital. He is prohibited from drawing out any part of this capital, during the continuance of the business relations, which were limited to January 1st, 1872. He is to employ Ethridge, at a salary of fifteen hundred dollars, and such other help as may be needed. The duty of Harrell is to give his whole time and attention to the business; and therefor, and because of his influence and business qualifications, Couch agrees to give him one-half the net profits, and he is to bear one-half the losses, if any are sustained.

Whether a person associated with another in trade or business, receiving a share of the profits as compensation for his labor and skill, is, as *between the parties themselves*, to be esteemed a partner, or only a servant or agent, is a question often of unmixed difficulty. The difficulty lies, not in ascertaining the principle by which the question may be determined, but in its application to the varying facts of the particular cases. It may be safely asserted, as the result of the authorities, it seems to us, that where there is a communion of profit and loss—when the party is not only entitled to share in the profits, but must bear the losses, whereby he may not only be excluded from all compensation, but involved in liability he can be compelled to discharge from his individual, separate property; when it is plain that he looked beyond the personal responsibility of his associate, to an interest or lien upon the resulting property or proceeds—a right beyond that of an ordinary creditor, which would survive the death or bankruptcy of his associate; a mere agency, or employment as a servant, is excluded, and, as between themselves, the parties are partners.—*Emanuel v. Draughn*, 14 Ala. 303; *Moore v. Smith*, 19 Ala. 774; *Meaher v. Cox*, 37 Ala. 201; *Scott v. Campbell*, 30 Ala. 728; 1 Smith's Lead. Cases, 985. Applying this test to the agreement of these parties, when it is read in the light of the circumstances, and construed according to its obvious meaning, we think a mere agency, mere employment on the part of Harrell, is excluded, and that, as between themselves, he and Couch were partners.

3. We are unwilling to dissent from the conclusion of the chancellor, that, if Harrell is to be charged with the one thousand dollars Mrs. Craig had contracted to pay him, the partnership, not Couch individually and separately, should be credited with it. In the superintendence of the business of Mrs. Craig, it was from the business of the partnership the time and attention of Harrell was withdrawn; the loss, if any was sustained, was sustained by the partnership; and for it compensation was due only to the partnership.

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4. There was no error in excluding such parts of the evidence of Couch and Etheridge, as sought to engraft on the written agreement, by parol, independent stipulations on the part of Harrell, increasing his duty and obligation. In the absence of fraud, or mistake, a writing in itself complete, and which has been executed with deliberation, cannot be varied or altered by oral evidence. It is presumed to contain the sole memorial of the contract of the parties: in it all prior negotiations or stipulations are merged; and when these are intentionally omitted, it cannot be said by either party subsequently that they were not waived.

We find no error in the record, to the injury of the appellant, and the decree must be affirmed.

Struve v. Childs.

Bill in Equity for Injunction of Sale under Mortgage.

1. *When equity will enjoin sale under power in mortgage.*—A court of equity will enjoin the execution of a power of sale in a mortgage, at the instance of a purchaser of the property, who bought subject to the mortgage, when it clearly appears that the power is perverted from its legitimate purpose, to oppress the purchaser, or to aid others in obtaining an unconscionable advantage over him; as where the mortgagee colludes with third persons, who are attempting to subject the lands to an alleged outstanding vendor's lien, to prevent the purchaser from successfully defending that suit, the litigation casting a cloud on his title, and preventing him from raising money on the property to pay off the mortgage debt, and thereby force him into a settlement or compromise of the asserted vendor's lien,—the sale will be enjoined until the termination of the vendor's suit.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE.

The bill in this case was filed on the 20th June, 1879, by Mrs. Mary C. Struve, the wife of William F. Struve, against Mrs. Jane H. Childs; and sought to enjoin the defendant from selling a house and lot in Huntsville, which was particularly described, under a power contained in a mortgage executed to her by John M. Crowder and William P. Newman, who afterwards sold and conveyed the property, subject to the mortgage, to the complainant. A temporary injunction was granted by the chancellor, on the filing of the bill; but afterwards, on motion in term time, he dismissed the bill, for want of equity, and dissolved the injunction; and his decree is now assigned as error. The material facts alleged in the

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bill were thus stated in the opinion of the court, as delivered by MANNING, J.:

“According to the bill in this cause, appellant, Mrs. Struve, bought a house and lot in Huntsville, of Crowder & Newman, who executed a conveyance of the same to her, subject to a mortgage made by them to appellee, Mrs. Childs, for the payment of their note for a debt of over \$1,500 to her, which appellant undertook and agreed to pay. For the rest of the price not then paid, appellant transferred to Crowder & Newman two notes of James I. Donegan to her; one of which, for \$3,183, they indorsed to Mrs. Carey. Donegan, against whom a judgment on this note was obtained, at the first court after its maturity, became insolvent; whereupon, the executor of Mrs. Carey, L. P. Walker, filed his bill in the Chancery Court, asserting a right to the equitable lien of a vendor, on the house and lot, for the payment of the Donegan note; and making Mrs. Struve, the purchaser, Mrs. Childs, the mortgagee, and Crowder & Newman, the vendors and mortgagors of the premises, and also indorsers of Donegan’s note to Mrs. Carey, defendants to the bill. Mrs. Struve promptly answered, denying the vendor’s lien. Mrs. Childs, and Crowder & Newman, did not answer, nor was any decree *pro confesso* taken against either of them; and the cause was thus not brought to an issue, so that Mrs. Struve could introduce her evidence, and press for a hearing and decision.

“In this state of things, Mrs. Childs advertised the property for sale, under a power of sale in the mortgage of Crowder & Newman, to pay the mortgage debt which had been assumed by Mrs. Struve. Not having the money, as she alleges, with which to pay it then, and being unable to raise it by a second mortgage on the property, in consequence of the cloud upon her title produced by the suit brought by Walker, as executor, to charge it with the equitable lien of a vendor; she, appellant, procured a friend, Morris Bernstein, to agree to purchase and take a transfer of the debt and mortgage from Mrs. Childs, and to give appellant further indulgence in the payment of the debt; and Mrs. Childs contracted with Bernstein, to accept the amount of said note from Bernstein, and to transfer and assign the mortgage to him; and thereupon, complainant procured insurance, at a premium of over \$30 on the house, for the sum of \$1,500, payable to a daughter of Bernstein, for whose benefit he intended to purchase the debt. But, when the time appointed for this transaction arrived, and Bernstein was ready and offered to perform his part of the contract, appellee, Mrs. Childs, refused to do so on her part, and resolved to proceed

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in making the sale, being instigated to do so, as she was also to advertise it in the first instance, by said Crowder, for the purpose of coercing appellant to consent to a charge of the amount of the Donegan note, which he and Newman had indorsed to Mrs. Carey, upon the property belonging to appellant, though it was not subject to such a charge, or to submit to a sale of said property at a sacrifice, by which said Crowder might be profited. Mrs. Childs is informed of these purposes of Crowder, and is aiding him to carry them into effect, to the oppression of appellant, and not from any desire to obtain payment of the debt due to her.

"This, with a few additional facts, is, in substance, what is charged in the bill. And thereupon appellant, complainant in the bill, prays that Mrs. Childs, the defendant, who is required to answer it under oath, be restrained from proceeding with the sale of the property, 'until the suit of Walker, as executor, is terminated, or until the further order of the court;' complainant offering, 'if the value of the land, and indestructible materials of the buildings, together with the said insurance already obtained on the property, is not an ample security to said Childs, Crowder & Newman, against any possible loss or damage by stay of sale, to give such indemnity as to the court shall seem just and reasonable.'"

CABANISS & WARD, for the appellant, cited *Ray's Adm'r v. Womble*, 56 Ala. 38; *Byers v. Surget*, 19 Howard, 303; 2 Jones on Mortgages, §§ 1447, 1801; 6 McLean, 142.

WALKER & SHELBY, *contra*, cited 2 Jones on Mortgages, §§ 1805-06; *Sloan v. Coolbaugh*, 10 Iowa, 31; *Meysenberg v. Schlieper*, 46 Mo. 209; *Bedell v. McClellan*, 11 How. Pr. 175; *Montgomery v. McEwen*, 9 Minn. 103.

MANNING, J. [After stating the facts as above.]—Courts of equity will sometimes interpose, to prevent an abuse of the process of a court upon a lawful judgment, or to restrain the execution of a lawful power of sale, when thereby an oppressive wrong, or fraud, is attempted to be accomplished. In respect to mortgages with power of sale, this jurisdiction is exercised with great circumspection. In Kerr on Injunctions (pp. 192-3), the doctrine in England is stated thus: "The court has no jurisdiction to restrain a mortgagee from selling under a power of sale, provided he keep within the terms of the power, and no case of fraud be made out. * * Unless there be fraud, or special contract, a mortgagee will not be restrained from selling under a power of sale." But, if "it is attempted to pervert the power from its legitimate

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purpose, and to use it for the purpose of oppressing the debtor, or of enabling the creditor to acquire the property himself, a court of equity will enjoin the sale, or will set it aside after it is made." Though "a stronger case must be made to call for such interference than to set aside the sale afterwards."—2 Jones on Mort. § 1801.

In *Robertson v. Norris*, 4 Jurist, N. S. 155, Sir J. STUART, Vice-Chancellor, said: "The legitimate purpose, for which the power to sell in this defendant's mortgage deed was given, was to secure him repayment of his mortgage money. If he uses the power to sell, which he gets for that purpose, for another purpose, from any ill motive, to effect means and purposes of his own, or to serve the purposes of other individuals, the court considers that to be what it calls a fraud in the exercise of the power, because it is using the power for a purpose foreign to the legitimate purposes for which it was intended." This ruling was affirmed on appeal.—See note 2, to § 1801, *supra*, and section 1447.

In Jones on Mortgages (§1447), a case is referred to (*Foster v. Hughes*, 51 How. Pr. N. Y. 20), very similar to the present: "where a wife, who owned the fee, tendered the mortgagee the amount of his debt, and asked for an assignment of the mortgage, which he refused to make; and the evidence showed that the mortgage was being foreclosed in the interest of the husband, in order to force her to settle a suit by her to annul the marriage, and litigations then pending about other property; as a new mortgage could not then be obtained, on account of the litigation, the court ordered that, if the mortgagee refused to assign, the proceedings should be stayed."

Neither this case, nor that of *Robertson v. Norris*, is at present within our reach, fully reported. But they seem to justify the claim made by plaintiff to relief. The facts relied on, as evidence of the purpose of defendant to aid, by a sale under her mortgage, those concerned against complainant in the suit of Walker, as executor, against her and others, to establish unjustly (as she avers) a lien on the property, are set out with particularity. So are those which show how, being embarrassed by that suit, and hindered from raising money by a second mortgage, complainant procured a friend to assist her, between whom and defendant it was agreed, that he would pay the amount of the mortgage debt to defendant, and she, defendant, should transfer the mortgage and debt to him; which agreement (it is alleged) defendant afterward refused to perform. What should be the effect of other facts in the case, will depend upon disclosures to be made in the further progress of the cause. Upon the bill as

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it stands, we are all of the opinion, that the injunction should have been continued.

Let the decree of the chancellor be reversed, and an order entered that the injunction be reinstated, and continued until the further order of the chancellor, after answer filed. The cause must be remanded.

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Action on Promissory Note, by Payee's Administrator against Maker's Administrator.

1. *Grant of administration on creditor's estate, to debtor; presumption of payment.*—When letters testamentary, or of administration, are granted to a debtor of the testator or intestate, the presumption of payment at once arises, and the debt is extinguished by operation of law, without regard to the duration of the administration, or the solvency of the debtor so appointed.

2. *Grant of administration on debtor's estate, to creditor; right of retainer, and extinguishment of debt.*—When letters testamentary, or of administration, on the estate of a deceased debtor, are granted to a creditor, he has a right to retain, out of the assets which may come into his hands, enough to pay his own debt, in preference to all others of equal degree; and if sufficient assets come to his hands, which might be legally applied in payment of such debts, his retainer for his own debt, and its consequent extinguishment, are conclusively presumed: no act on his part is necessary to effect it, nor can any act or laches on his part prevent it.

3. *Same; extent of right of retainer.*—This right of retainer, with its legal consequences, is not limited to debts due to the personal representative individually, but also includes debts due to him as trustee, or as executor or administrator of another person.

4. *Same; as affected by statutory provisions.*—The common-law doctrine of retainer, as above stated, is not repealed by statute in this State, unless the insolvency of the estate of the deceased debtor intervenes; but it is modified by the changes effected by statute, as to the title, rights and duties of executors and administrators.

5. *Rights and powers of executor or administrator over personal assets.*—At common law, an executor, or administrator, was regarded as the absolute owner of all the personal assets, and, as an incident of ownership, had unlimited power to dispose of them; but, under our statutes, while his power to dispose of the *choses* in action is unlimited, he can not dispose of the visible, tangible personal property, except by an order of sale made by the proper Probate Court.

6. *Same; right of retainer, and extinguishment of debt.*—In consequence of this statutory change in the rights and powers of an executor or administrator over the personal assets, a retainer and extinguishment of his debt will not be presumed from the mere possession of visible, tangible personal property, until after the lapse of a reasonable time, within which it might, by a sale under an order of the proper court, be converted into money, and applied in payment of debts; but, after the lapse of such reasonable time, the executor or administrator can claim no advantage from his own negligence and laches, and the presumption attaches, although he did not in fact obtain an order of sale.

7. *Liability of lands for debts; right of retainer, and extinguishment of debt.* The decedent's lands are charged by statute with the payment of his debts,

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and may be sold for that purpose, under an order of the Probate Court, granted on the application of the executor or administrator, when the personal assets are insufficient; and the failure to exercise this statutory power, in a proper case, is a breach of duty on his part, from which result the same consequences, as to the retainer and presumed extinguishment of his debt, as from his failure to obtain an order for the sale of the personal property.

8. *Same; when retainer and extinguishment will be presumed.*—The failure of the executor or administrator to exercise these statutory powers, by obtaining orders of sale from the proper court, for such length of time as would render him chargeable at the suit of other creditors, is sufficient to raise the presumption of the extinguishment of his own debt.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JOHN K. HENRY.

This action was brought by Joseph N. Miller, as administrator *de bonis non* of the estate of Elizabeth E. Irby, deceased, against Lucy T. Irby, as the administratrix *de bonis non* of the estate of Christopher P. Irby, deceased; and was commenced on the 18th May, 1876. The action was founded on a promissory note for \$6,000, executed by the defendant's intestate, payable to the plaintiff's intestate, or order, one day after date, with interest from date; which was dated, at the top, March 16th, and at the bottom January 1st, 1863; and on which was indorsed a credit, signed by *E. E. Irby*, in these words: "Received on the within note, from J. E. and W. Irby, administrators of est. C. P. Irby, five hundred dollars, Jan. 1, 1868."

The defendant pleaded, "in short by consent"—1st, *non assumpsit*; 2d, payment; 3d, the statute of limitations of six years; 4th, the insolvency of her intestate's estate; and, 5th, a special plea as follows: "And for a further plea, in short by consent, defendant says, *actio non*, &c., because she says that defendant's intestate died on the — day of November, 1867, and one William Irby and J. E. Irby were duly appointed and qualified as his administrators, and entered upon the duties of their office; and that a large amount of assets came into their hands, belonging to the estate of C. P. Irby, more than sufficient to satisfy plaintiff's demand, and all other demands against his estate; that afterwards, about the year 1870, the said J. E. Irby died, and on the 10th day of November, 1870, Elizabeth Irby, the plaintiff's intestate, also died, and the said W. Irby was also appointed the administrator of her estate; and that while the said W. Irby was such administrator of both estates, the estate of said C. P. Irby was solvent, and said W. Irby had money assets in his hands belonging to the estate of C. P. Irby, adequate to the satisfaction of the demand of plaintiff's intestate, and which he, as her administrator, might lawfully have appropriated, or retained in extinguishment or payment of said de-

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mand; that he continued to be the administrator of both estates, until his death, which occurred in November, 1875; the estate of C. P. Irby, from the time of W. Irby's appointment as administrator thereof, in 1867, until his death in 1875, being administered upon as a solvent estate, the same never having been declared insolvent. Wherefore, and by reason of the premises, the defendant says, that the plaintiff's claim was and is extinguished by retainer as aforesaid, and the right of action against this defendant lost."

The fourth plea was afterwards withdrawn, by leave of the court. The plaintiff took issue on the first and second pleas, replied specially to the third, and demurred to the fifth, assigning the following as grounds of demurrer: 1. "Said plea does not allege that said W. Irby and J. E. Irby, after they were appointed administrators on the estate of C. P. Irby, deceased, applied any of the proceeds arising from said estate to the payment of plaintiff's demand." 2. "Said plea does not allege that said W. Irby, at any time while he was administrator upon the estates of said C. P. Irby and Elizabeth E. Irby, appropriated or retained any of the money assets of the estate of said C. P. Irby in extinguishment or payment of plaintiff's demand, or any part thereof." 3. "Said plea does not allege that said W. Irby, as the administrator of said Elizabeth E. Irby, retained or appropriated any money assets of the estate of C. P. Irby in his hands to pay and satisfy plaintiff's demand, or any part thereof." 4. "Said plea does not allege that plaintiff's demand has ever been paid or satisfied." 5. "Said plea is, in law, no answer to the complaint." 6. "Said plea nowhere alleges that the estate of defendant's intestate was insolvent." The court overruled the demurrer, and the plaintiff took issue on the fifth plea. The replication to the third plea alleged the grant of letters of administration on the two estates of C. P. Irby and Elizabeth E. Irby to said W. Irby, and that while he was the administrator of both estates—to-wit, from the 16th November, 1870, to the 10th May, 1875—and had possession of the note now sued on, there was no person who could be sued, and the statute of limitations was suspended. The court sustained a demurrer to this replication, and the plaintiff then took issue on the third plea also.

On the trial, as the bill of exceptions states, the plaintiff read in evidence the note sued on, and proved the indorsement on it of a partial payment, as above stated. "It was shown in evidence, also, by the plaintiff, that said Elizabeth E. Irby, the plaintiff's intestate, died in September, 1870, and letters of administration on her estate were issued by the Probate Court of Wilcox county, on the 16th November,

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1870, to Josiah E. Irby and William Irby; that said C. P. Irby died in November, 1867, and letters of administration upon his estate were issued by said Probate Court, on the 12th December, 1867, to said Josiah E. and William Irby; that said J. E. Irby died in November, 1870, and letters testamentary on his estate were granted by said Probate Court, on the 9th January, 1871, to Charles Irby as executor; that said William Irby died in May, 1875, and letters testamentary on his estate were issued on the 7th July, 1875, to his widow; that said J. E. Irby and W. Irby continued to be joint administrators on the estate of said Elizabeth E. Irby up to the time of the death of said J. E. Irby, and after his death said William Irby continued to be the surviving administrator on said estate up to the time of his death; that after the death of said William Irby, the plaintiff in this suit, said Joseph N. Miller, became the administrator, *de bonis non*, of the estate of said Elizabeth E. Irby; that said J. E. Irby and W. Irby, at the time they were appointed administrators on the estate of said Elizabeth E. Irby, were administrators of said C. P. Irby, and continued to be administrators on both of said estates up to the time of their respective deaths, as above stated. The defendant offered in evidence to the jury the appraisement of the estate of said C. P. Irby, returned to the Probate Court of Wilcox county, which showed the appraised value of said estate to be \$13,941, besides personal property set apart to the widow amounting to \$944.50." (This appraisement is copied into the bill of exceptions, and shows that the land was valued at \$9,000, and that the personal property consisted of mules, cattle, plantation implements, &c., and a "lot of manufactured tobacco and merchandise," which was appraised at \$300.) "This was all the evidence offered by the defendant. This being all the evidence, and there being no dispute about the facts of the case, the court charged the jury, that, if they believed the evidence, they must find for the defendant. The plaintiff excepted to this charge, and requested the court, in writing, to instruct the jury that, in order to make the facts set out in the fifth plea a defense to the complaint, it must appear that said William Irby had in his hands, as administrator of C. P. Irby's estate, moneys belonging to said estate, during the time he was the administrator of both said estates (namely, C. P. Irby's and Elizabeth E. Irby's), sufficient to pay the amount due on the note sued on, at some time while said William Irby was administrator upon both estates. The court refused this charge, and the plaintiff excepted."

The rulings of the court on the pleadings, the charge
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given, and the refusal of the charge asked, are now assigned as error.

S. J. CUMMING, for appellant.—1. There is no pretense in this case that the debt has been paid in fact; and this court has said, that the presumption of payment, when the right to demand and the right to receive co-exist in the same person, “like all other presumptions, should be indulged in furtherance of justice, and not to defeat it.”—*Flinn v. Carter*, 59 Ala. 364. But the record does not show a state of facts which authorizes the presumption of payment, or extinguishment. No act of the plaintiff, or of his intestate, brought about the condition of facts shown by the pleadings. The appointment of an executor is the act of the party himself, while the appointment of an administrator is the act of the law, and does not involve the same consequences. The distinction between the two, as applied to the facts of this case, is an important one: the former appointment extinguishes the debt, while the latter only suspends it during the continuance of the double relation in the same person.—*Dorchester v. Webb*, Cro. Car. 372; *Needham's case*, 8 Co. Rep. 136; 3 Rob. Pr. 315.

2. The fifth plea averred that money assets, sufficient to pay the debt, came to the hands of the administrator, but the proof did not sustain the averment; and the charge of the court, in effect, held the averment unnecessary, and the proof sufficient without that fact.—*Kimball v. Moody*, 27 Ala. Rep. 130.

3. The suspension of the right of action, while the same person holds the twofold relation of debtor and creditor, is a doctrine of the common law, and is entirely outside of the statutes of limitation, and unaffected by them.—Authorities first above cited.

COCHRAN & DAWSON, *contra*.—The statute of limitations was a complete defense to the action. Having commenced to run in the life-time of plaintiff's intestate, it continued to run until the bar was perfected.—Angell on Limitations, §§ 196-7; Broom's Legal Maxims, 609; *Lee v. Leachman*, 22 Ala. 455; 17 Ala. 291. The fact that the same person was the administrator of the debtor and creditor estates, did not suspend the running of the statute.—Authorities cited *supra*; also, *Dudley v. Faulkner*, 49 Ala. 148; *Dorchester v. Webb*, Cro. Car. 372.

BRICKELL C. J.—It is, in this court, a doctrine which ought to be regarded as familiar, and settled, that if the

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debtor to a testator, or to an intestate, takes probate of the will, and qualifies as executor, or obtains a grant of administration, the debt is extinguished. Incapable of suing himself; divesting the contract of parties, an essential element to its origin and continuance; converting the debt, for all practical purposes, from a *chose* (or thing) in action, into a *chose* (or thing) in possession; by operation of law, the equivalent of a judgment and execution against himself, satisfaction of which it is his duty, legal and moral, to make; voluntarily taking upon himself the right and duty to demand and receive, and the existing obligation of paying and discharging resting upon him; it is the just, natural, logical, legal consequence of his voluntary act, that the debt, he is in his fiduciary capacity bound to demand and receive, and which he is under legal and moral obligation to pay and discharge, should be presumed conclusively paid and discharged.—*Hampton v. Shehan*, 7 Ala. 298; *Purdum v. Tipton*, 9 Ala. 914; *Whitlock v. Whitlock*, 25 Ala. 543; *Ragland v. Calhoun*, 36 Ala. 606; *Whitworth v. Oliver*, 39 Ala. 286; *Seawell v. Buckley*, 54 Ala. 592. The duration of his administration is not important. The instant the dual obligation, duty and capacity are created by his voluntary act, the presumption the law raises, of necessity obtains. In *Ragland v. Calhoun*, *supra*, it was said by this court; "Where a debt and credit—a right to demand, and an obligation to pay—coexist, even for a moment, in the same person, the debt is extinguished by the presumption of payment."

If William and J. E. Irby, at the time of their appointment as administrators of Elizabeth E. Irby, had been indebted to their intestate, under the operation of this principle, such indebtedness would have been extinguished. Without regard to their solvency, it would have been converted into assets—money in their possession, which they would have been under the duty of accounting for, and applying in the due course of administration.—*Simmons v. Gutheridge*, 13 Vesey, 264; *Windrop v. Bass*, 12 Mass. 199; *Bigelow v. Bigelow*, 4 Ohio, 138; *Prentice v. Dehon*, 10 Allen, 353. In *Simmons v. Gutheridge*, *supra*, it was said by the Lord Chancellor: "A debt due by the executor, to the estate of the testator, is assets, for the same plain reason upon which an executor who is a creditor may retain: that he cannot sue himself."

An executor does not, in this State, have the right of intermeddling, taking control of, and disposing of the assets, before probate of the will. It is only in a qualified sense that it may be said his authority is derived from the will. The probate of the will, and the grant of letters testamentary,

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are indispensable to his rightful custody and control of the assets, and to his exercise of the powers the will may confer, or of his authority under the law. A grant of administration is, of course, the source of the duty and authority of an administrator. Letters testamentary, or letters of administration, clothe the executor, or the administrator, with the full legal title to all personal assets, and the right to pursue all legal remedies, which the testator or intestate, if living, could pursue for the reduction into possession of things lying in action.

Retainer is a remedy by mere operation of law, and is thus explained and defined by Blackstone: "If a person, indebted to another, makes his creditor, or debtee, his executor; or, if such a creditor obtains letters of administration to his debtor; in these cases, the law gives him a remedy for his debt, by allowing him to *retain* so much as will pay himself, before any other creditors whose debts are of equal degree. This is a remedy by the mere act of the law, and grounded upon this reason: that the executor cannot, without an apparent absurdity, commence a suit against himself, as a representative of the deceased, to recover that which is due to him in his own private capacity; but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose."—3 Black. 18. To constitute a retainer, and, of consequence, a satisfaction and extinguishment of the debt, there was no act to be done by the executor or administrator—no discretion, or volition, to be exercised by him; no election whether he would retain or not. The moment assets came to his possession, which, in the due course of administration, were and could be legally applied to the payment of the debt, the law, of its own force, made the application.—*Smith v. Watkins*, 8 Humph. 341.

At the common law, the executor, or administrator, was regarded as the absolute owner of the personal assets, and an unlimited power of disposition was an incident of the ownership. In *Woodward v. Lord Darsy* (Plowden, 185 a), the reason of the doctrine, that possession of assets operates an extinguishment of the debt, is said to be, "because, in judgment of law, he is satisfied before; for, if the executor has as much goods in his hands as his own debt amounts to, the property of those goods is altered, and vested in himself—that is, he has them as his own proper goods, in satisfaction of his debt, and not as executor; so that there is a transmutation of property by operation of law."

In *Wankford v. Wankford*, 1 Salk. 305, HOLT, C. J. said: "If the executor of the obligee is made executor to one of

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the obligors, and has assets of the obligor, the debt is extinct, and the executor cannot sue the other obligor; for the having assets amounts to payment." So, in *Fryer v. Gildridge* (Hobart, 10 a), it was held, that if the same person be executor of the obligor and obligee, and there be sufficient assets of the obligor, the debt is presently satisfied, by way of retainer. The surer reason for the doctrine, and that which prevented a revival of the cause of action, it was said, was that, "when the obligor made the executrix of the obligee his executrix, and left assets, the debt was presently satisfied, by way of retainer, and, consequently, no new action can be had for the debt."

When there are assets in the possession of the personal representative, which are legally applicable to the payment of the debt, the doctrine of the common law seems well settled—the debt due him is paid. No laches in making the application, no indiscretion in parting with the assets, can avoid the result. The law works out the result, and it is not in the discretion of the personal representative to keep alive and continue the debt, or by any subsequent act to revive it. *Smith v. Watkins*, *supra*; *Choffin v. House*, 4 Dev. (Law) 103; *Eichelberger v. Morris*, 9 Watts, 42; *Thomas v. Thompson*, 2 Johns. 471. It is, however, the possession of assets which may be rightfully retained, that works the extinguishment of the debt.—*Hall v. Pratt*, 5 Ohio, 82. For, as was said in *Wankford v. Wankford*, *supra*, if the personal representative has no assets, "then he is not the person that ought to pay, though he is the person that is to receive."

The right of retainer, and its consequences, are not limited to debts due the personal representative individually. It extends to debts due him as trustee.—2 Williams Ex'rs, 938. And when the same person is the personal representative of both creditor and debtor, he may retain out of the assets of which he is possessed as the representative of the debtor, to satisfy the debt due him as representative of the creditor.—2 Williams Ex'rs, 943; 1 Lomax on Ex'rs, 650; Toller on Ex'rs, 295; *Thompson v. Cooper*, 1 Call, 86; *Thomas v. Thompson*, 2 Johns. 471; *Hosuck v. Rogers*, 6 Paige, 415; *Morrow v. Peyton*, 8 Leigh, 54.

Unless the insolvency of the estate of the testator, or intestate, who may be indebted, intervenes, we cannot see that, by our legislation, this doctrine of the common law is repealed. It is subject to modification, because of the changes of the common law, as to the title, rights, and duties of executors or administrators, which our statutes have wrought. While the personal representative has the same title to the personal assets that he had at common law, he has not the

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unqualified power of disposition of such as are not choses in action. Visible, tangible, personal property, the subject of sale, he cannot dispose of otherwise than by sale made under an order of the Court of Probate, or the decree of some other court of competent jurisdiction; and, with one or two exceptions, the sale must be at public outcry. Any private sale, or other disposition of such property, is void—a *devastavit*.—1 Brick. Dig. 932, §§ 266, 274-77; *Waring v. Lewis*, 53 Ala. 630. The mere possession of personal property, of that kind which he cannot apply to the payment of the debt due him, or of any other debt of the decedent, will not, of itself, extinguish, or work a presumption of payment of his debt. The reason of the rule ceases, and the right upon which it is founded does not exist. Being under the duty and obligation of paying, and also under the duty of receiving and demanding, it is only when he has assets which he can and ought to appropriate, that the law considers them applied, and the debt extinguished. Having no right to take and appropriate such assets—his only duty being to convert them into money for the payment of debts—the debt will not be presumed paid, until, from the lapse of time, the failure to convert them into money, and make the application, can justly be attributed to his negligence and misconduct. Of such negligence and misconduct he can claim no advantage—no absolution from the presumption which would attach, if he had been diligent.—*Kimball v. Moody*, 27 Ala. 130.

The whole property of a decedent (saving exemptions), real and personal, is charged with the payment of his debts, and must be sold for that purpose.—Code of 1876, § 2429. When the personal assets are insufficient for the payment of debts, the lands must be sold, and the proceeds of sale applied to their payment. It is only through an order of the Court of Probate, made upon the application of the personal representative, that a sale of the lands can be made. The personal representative has the power, and it is his duty, to rent the lands. These statutory provisions have not been construed as altering or preventing the descent of lands, or as intercepting the estate of the devisees. As at common law, the heir takes by descent, or the devisee by the devise, immediately on the death of the ancestor, or devisor. There is no chasm, in which the title is in abeyance. The personal representative has a statutory power, from which results a corresponding duty, that he may exercise; but he has no estate in the lands; and until the power is exercised, the heir or devisee is in as he was at common law. The lands are assets, only through an exercise of the power.—*Anderson v. McGowan*, 42 Ala. 280. Yet, a want of diligence in exer-

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cising the power will involve the personal representative in responsibility. There is no discretion, no volition, committed to him. Subjecting the lands to the payment of debts, is a duty he is bound to perform; not distinguishable from the duty of reducing the personal property which is the subject of sale, to money, or the choses in action, to choses in possession. The power of renting, the power of sale, involves the duty; and for a loss resulting from neglect of this duty, he must be chargeable with the consequences, as he is with the injurious consequences resulting from the neglect of any other duty.—*Pearson v. Darrington*, 32 Ala. 227; *James v. Faulk*, 54 Ala. 184.

A debt due to him individually, or a debt due to him as trustee, or a debt due to him as the personal representative of another, would not be extinguished, *merely* because there were lands subject to its payment, which he could, by pursuing and exercising the statutory power, have reduced to money he must have appropriated to its payment. But, if there is negligence in the exercise of the power, rendering him liable to creditors, which would make him answerable for the debt, if a stranger had the authority, and was under the duty of demanding and receiving; can the presumption of payment and extinguishment be repelled? If it can, by his negligence, the debt is kept alive and continued, which he has not the power and capacity of doing by positive action; and is effected, if effected at all, only by his mere inaction and dereliction of duty. When the debt is due to him as trustee, or in the capacity of personal representative of the creditor of his testator or intestate, he would be chargeable with it, in favor of creditors, legatees, or next of kin, having the beneficial interest, and to whom he stands in the relation of trustee. The mere negligence of the personal representative, his folly or indiscretion, can not, nor can his immediate direct action, prevent the extinguishment of the debt, when there are assets which, by the fair and just performance of his duty, he could legally appropriate to the payment of the debt. If he paid the debt from his own means, there can be no doubt he would, from the proceeds of the sale of the land, be allowed to retain for his indemnity.—*Livingston v. Newkirk*, 3 Johns. Ch. 312. And if he is charged with the debt, because of his negligence, on the settlement of his administration of the estate of the creditor, he must be credited with it on a settlement of his administration of the debtor; and if he is not otherwise in default, for the balance due him on the latter settlement, the lands can be made liable.

The intestate of the appellant, the creditor of the intestate

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of the appellee, died in September, 1870, and administration of her estate was, on the 16th November, 1870, committed to J. E. and William Irby, who were then, and had been since the 12th December, 1867, administrators of the estate of the intestate of the appellee. Property, real and personal, of the estate of the debtor, had come to their possession, which the law subjected to liability for the payment of the debts, and required should by sale be converted into money for that purpose. The value of this property, as appraised (and the appraisement is not controverted), exceeded the amount of the debt due the intestate of the appellant. What disposition has been made of this property, real or personal, is a fact in reference to which the record is silent. By sale, it may have been converted into money, which the law, by its own operation, would have appropriated, without the act or volition of the personal representative, forever extinguishing the demand and debt due the intestate of the appellee. True, J. E. Irby died soon after he became administrator of the estate of the appellant. But, for near three years he had been, with William, joint administrator of the estate of the debtor, having ample time and opportunity to reduce the assets, real and personal, to money, as it was his duty to do, and apply the money to the payment of debts. His death caused no interruption or vacancy in the administration of either estate. The survivor, William, was required to complete each administration.—Code of 1876, § 2413. And administration continued with him, until his death in May, 1875.

There was, then, a period of near five years, during which the administration of both estates, that of the creditor, and that of the debtor, was united in the same person. In the one capacity, it was his duty to demand and receive; in the other, it was his duty, so far as he had assets legally chargeable, to pay and satisfy. There was no deficiency of assets, and he was chargeable with the debt as money in his capacity of administrator of the estate of the creditor, and entitled to a credit for it when so charged, in his capacity of administrator of the debtor. Unless negligence, delinquency in the discharge of trusts, violation of duty, is presumed, the presumption of payment and extinguishment must be indulged. For all purposes, the debt is extinguished, and as to all persons. Changes in the administration can not revive it. As we have seen, in obedience to the settled doctrine of this court, if the debt had been due from the administrators individually, it would have been extinguished, *eo instanti* their appointment and qualification. The only distinction which can be made, when the debt is due from them in a represent-

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ative capacity, depends upon the sufficiency of assets which they may receive, and which they can rightfully appropriate to its payment. Assets which can be applied, only after they have been converted into money, are not immediately appropriated to the extinguishment of the debt. But, when the period during which debts should have been paid, by the appropriation of the assets in the mode prescribed by law, has passed—when only gross negligence can have prevented the appropriation—when the representative stands chargeable with the debt as money,—it must be regarded as extinguished. It results, therefore, that the demand on which the suit is founded must be considered as extinguished.—*Kimball v. Moody*, 27 Ala. 130.

This conclusion compels an affirmance of the judgment, without the decision of the other question which has been discussed.

Hinton v. Citizens' Mutual Insurance Company.

Bill in Equity for Reformation and Foreclosure of Mortgage.

1. *Decree against non-resident, on publication; petition to set aside.*—When a decree in chancery against a non-resident defendant, rendered on publication only, without personal service or appearance, is set aside on his petition, and he is let in to defend, the petition has accomplished its purpose, and the cause stands as if such decree had never been rendered; consequently, it is not a material question afterwards, whether he had notice of the pendency of the suit or not.

2. *Notice to agent; when not binding on principal.*—Notice to an auctioneer, employed to make a sale of lands, of the pendency of a suit against his principal respecting the property, does not operate as notice to his principal, being outside the scope of his powers and duties.

3. *Amendment of bill, or answer; when refused in vacation.*—The allowance of an amendment to the bill or answer, to meet any state of the evidence which will sustain the claim or defense set up, is matter of right in the party asking it, and not matter of discretion with the court (Code, § 3790); but, when the application to amend is made in vacation, without notice to the adverse party, it may be refused for that reason.

4. *Reformation of written instrument; when decreed.*—A court of equity will reform a written instrument, on the ground of mistake, only on clear and satisfactory evidence of the mistake as alleged: in the absence of such evidence, the writing remains the sole expositor of the agreement of the parties.

APPEAL from the Chancery Court of Sumter.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 22d March, 1876, by the "Citizens Mutual Insurance Company," a corporation

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chartered under the laws of this State, and located in the city of Mobile; and sought to reform and foreclose a mortgage executed to said company, or to its secretary for its benefit, by the partners composing the firm of G. A. Brown & Sons. The mortgage was dated the 25th March, 1875; purported to secure the payment of a promissory note for \$2,423.90, of even date with the mortgage, and payable on the 1st January, 1876; and conveyed a tract of land, which was therein described as follows: "All that tract of land, lying and being in Sumter county, Alabama, known as the 'Knight place,' and numbered as follows: all of the north half of section thirty-three (33), township twenty (20), range one (1) west, which lies south of the Martin's Ferry road; and the south-east quarter of section four (4), township nineteen (19), range one (1) west; said to contain five hundred and twenty-nine (529) acres, more or less." The note was made payable to "S. W. Allen, sect. C. I. Co."; and the mortgage recited that it was payable to "S. W. Allen, sect. of Mobile Mutual Insurance Company," and conveyed the lands to "S. W. Allen, sect."; but the bill alleged that Allen was the complainant's secretary, that the indebtedness was due to the complainant, and that the mortgage was intended to convey the lands to it, or for its benefit, and that these mistakes were caused by inadvertence on the part of said Allen, who had died before the filing of the bill. The bill alleged, also, that there was a mistake in the description of the lands intended to be conveyed; that the intention was to convey the entire tract of land known as the "Knight place"; and that the following portions of the tract were, by mistake, omitted in giving the numbers, to-wit: "the south-east quarter of said section thirty-three (33), and the north-east quarter of said section four (4)."

The partners composing the firm of G. A. Brown & Sons, the executrix and sole devisee of S. W. Allen, deceased, Geo. W. Bates, and George W. Hinton, were made defendants to the bill; said Bates being joined, under an averment that he was in possession of the lands; and Hinton, because he claimed to hold a mortgage on the lands, dated the same day with the complainant's mortgage, and purporting to be given to secure a debt due to him from said Brown & Sons; and the bill alleged that the complainant's mortgage was entitled to priority over Hinton's mortgage, because it was first recorded, and complainant had no notice of Hinton's. The partners composing the firm of Brown & Sons, and Hinton, were non-residents, and publication was prayed and duly made against them as non-residents; and a decree *pro confesso*, on proof of publication, was duly entered against them in term.

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time, before the chancellor. At the same term (May, 1876), the cause being submitted for final decree, on the bill and exhibits, and decrees *pro confesso*, the chancellor rendered a decree for the complainant; ascertaining by calculation the amount due on the complainant's mortgage, and ordering a sale of the lands by the register; and also requiring the complainant to execute a bond, as prescribed by the statute (Code, § 3831), before having execution of the decree.

In November, 1876, Hinton filed his petition, asking to have the decree set aside, and to be allowed to file an answer; alleging that he had no notice of the pendency of the suit, until about the 26th September, 1876. The chancellor thereupon set aside the decree, and allowed an answer to be filed by Hinton, on payment of costs. In his answer so filed, which was under oath, Hinton set up his mortgage, and claimed under it a priority and preference over the complainant's mortgage; alleging that, though it was dated the 25th March, it was in fact executed, delivered, and acknowledged on the 24th, and that the 25th was inserted by mistake. As to the consideration on which his mortgage was founded, the answer contained the following allegations: "Prior to the execution and delivery of said mortgage, said G. A. Brown & Sons were engaged in the cotton commission business in Mobile, Alabama; and respondent sent to them a large number of bales of cotton, for sale on his account. Said cotton was sold by them in the usual course of trade and business, but they failed to pay over the proceeds of sale to respondent; and he went to Mobile, and the best settlement he could get, for his money in their hands, was their note and mortgage for the balance of the proceeds of this sale. This is the consideration for said mortgage." In the petition to set aside the decree, the consideration was thus stated: "Prior to the 24th March, 1875, said G. A. Brown & Sons were engaged in the cotton and commission business in Mobile, Alabama; and your petitioner sent to them a large number of bales of cotton, for sale on his account. Said cotton was sold, in the usual course of trade and business, by said Brown & Sons, but they failed to make returns, as was their duty to do; and your petitioner went to Mobile, and obtained from them part of the proceeds of sale of his cotton and obtained a mortgage for the balance on the lands decreed to be sold in this case." The answer and petition alleged, also, that on the 17th April, 1876, the mortgage debt not being paid at maturity, Hinton caused the lands to be sold, under a power of sale contained in his mortgage; at which sale, one George Stoutz became the purchaser, for

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about the amount of the mortgage debt, and afterwards conveyed to Hinton.

The complainant's mortgage was recorded on the 29th March, and Hinton's on the 11th May, 1875. Each party insisted that the other's mortgage was given for an antecedent indebtedness, and not for a debt or liability presently created or assumed; and each claimed priority for his mortgage. Hinton also denied the alleged mistake in the complainant's mortgage, and alleged that the complainant, or said S. W. Allen, its secretary, was informed by Brown & Sons of the prior execution of his mortgage at the time the complainant's mortgage was given. No testimony was taken by the complainant, to prove the alleged mistake in the description of the lands conveyed by its mortgage. The defendant took the deposition of Thomas Le Baron, of Mobile, an auctioneer, by whom the sale under Hinton's mortgage was made in April, 1876; and who testified, in answer to cross-interrogatories filed by the complainant, that at that sale the complainant's solicitors gave public notice of the pendency of this suit, and of the fact that Hinton was a party to it. The defendant also took the deposition of G. A. Brown, one of the partners of said firm, who testified to the date, execution, &c., of Hinton's mortgage, and stated its consideration thus: "The consideration of said mortgage was not sales as commission-merchants by G. A. Brown & Sons, but was in consideration of fifteen bales of cotton loaned to G. A. Brown, jr., as a private matter, and the amount assumed by the firm of G. A. Brown & Sons."

After the testimony was in, the complainant submitted a motion to strike Hinton's answer from the files, and to render a decree final against him; because his petition and answer both denied that he had any notice of the pendency of the suit, while the depositions of Le Baron and Stoutz showed that said Le Baron, while making the sale under his mortgage as his agent, was notified of the suit. At the June term, 1877, the cause was submitted to the chancellor for final decree, on pleadings and proof, and on the motion to strike the answer from the files; and was reserved for consideration in vacation. In vacation afterwards, while the cause was still in the hands of the chancellor, Hinton applied to the register for leave to amend his answer, by striking out the allegations as to the consideration of his mortgage, and making its averments correspond with the testimony of G. A. Brown, above stated; but the register declined to act upon the application, and forwarded it to the chancellor. The chancellor overruled and refused the application to amend, because (with other reasons) no notice of it had been

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given; and he proceeded to render a final decree for the complainant, holding—1st, that the notice to Le Baron, the auctioneer, charged Hinton with notice of the pendency of this suit before the first decree was rendered against him, and therefore he should not be allowed to re-litigate the matters settled by that decree; 2d, that the complainant's mortgage was entitled to preference and priority over Hinton's; 3d, "that said mortgage clearly shows, on its face, that the entire tract of land known as the 'Knight place,' containing 590 acres, more or less, was intended to be, and was in fact, conveyed to complainant by said mortgage"; and ordering a sale of the entire tract, for the satisfaction of said mortgage.

From this decree Hinton appeals, and here assigns each part of it as error, with the refusal of the chancellor to permit him to amend his answer.

JAMES COBBS, and G. Y. OVERALL, for appellant.

SNEDECOR & COCKRELL, *contra*. (No briefs on file.).

BRICKELL, C. J.—1. A decree in chancery, rendered without personal service, against a defendant who does not appear, is not absolute for eighteen months after the rendition thereof. At any time within this period, such defendant has the liberty of filing a petition to open the decree, and to be let in to defend upon the merits; and if sufficient cause is shown, the chancellor is bound to open the decree, and hear the cause, as if it had not been rendered.—Code of 1876, §§ 3830-31. Upon a petition disclosing merits, the chancellor opened the decree which had been rendered against the appellant, on a decree *pro confesso*, obtained on publication, without personal service. When the cause was opened, and the appellant let in to defend, the petition had accomplished its purposes: the cause stood in court as if the decree had not been rendered; and it was not a material fact, whether constructive notice of the pendency of the suit, before the rendition of that decree, could or could not be traced to the appellant.

2. Notice, in legal proceedings, is of great variety, and its character and sufficiency, and the mode of giving it, depend upon the requisitions of the law, and its purposes, in the particular instance. The denial of notice in the petition to open the decree, if that was now a matter of inquiry, was of notice in the mode to which the appellant was entitled, and not of the constructive notice which may be imputed to a principal, of facts made known to his agent. Besides, it was not within the scope of the duties of an auctioneer, employed

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to make sale of property, to take or receive notice of the pendency of suits against his principal, affecting the property. The chancellor was in error in regarding the cause as *res adjudicata*, because of the former decree, and the information given to the auctioneer, of the pendency of the suit prior to its rendition.

3. The statute is broad in its terms, that, at any time before final decree, amendments to bills must be allowed, to meet any state of the evidence which will authorize relief; and of answers, to set up any matters of defense.—Code of 1876, § 3790. The amendment is matter of right—it is not matter of favor, resting in the discretion of the court. The only inquiry the court can make is, whether there is evidence to support the amendment, and it is material, not capable of being introduced in the present state of the proceedings. This being ascertained, the chancellor may impose such terms as are just under the peculiar circumstances, not extending beyond the payment of all costs; but he cannot disallow the amendment. No closeness of construction has been, or can be, given the statute, but it has been, and must be regarded, as remedial, and must be so construed that its beneficent purposes will be promoted. Notice of the amendment to the opposite party is necessary, when it is not claimed in open court, after his appearance. In the present confused state of the record, we cannot determine with any certainty the precise character of the amendment—whether it was of the answer, or of the petition to open the decree. But application for it was made in vacation, without notice to the complainant; and for that reason, the chancellor properly disallowed it.

4. The reformation of written instruments is made by a court of equity, only on full and satisfactory evidence that, by mistake, they express more or less than the parties intended. Until, beyond reasonable controversy, the mistake is made to appear, the writing must remain the sole expositor of the intent and agreement of the parties.—1 Brick. Dig. 685, § 644. Without any evidence of mistake, and though it was denied in the answer of the appellant, the chancellor proceeded to reform the mortgage to the appellee, introducing into it lands not previously described. This was manifest error, compelling a reversal of the decree.

We do not deem it proper now to consider and pass upon any of the other questions involved in the controversy, as they will probably hereafter be presented under a different state of pleading, and, it may be, of evidence.

Reversed and remanded.

[Acklen's Executor v. Hickman.]

Acklen's Executor v. Hickman.

Action on Common Courts.

1. *Refreshing memory of witness by memorandum.*—A witness may refresh his memory by examining a memorandum made by himself, or known and recognized by him as stating the facts truly, when, after such examination, he can testify to the facts as matter of independent recollection; but, in such cases, the memorandum itself is not thereby made evidence in the cause, unless the opposing party calls for it.

2. *Same.*—If the memory of the witness is not refreshed by an examination of the memorandum, so that he can testify to the facts as matter of independent recollection, but he can nevertheless testify that, at or about the time the memorandum was made, he knew its contents, and knew them to be true, his testimony and the memorandum are both legal and competent evidence; but, if he did not know the contents of the memorandum to be true when it was made, although he saw it made, and he has no independent recollection of the facts after examining it, the memorandum is not admissible evidence of the facts therein stated.

3. *Alien enemy*—In an action on the common counts, where the plaintiff relies for a recovery on an account stated since the close of the late war, and partial payment or acknowledgment made since that time, no question of alien enemy can arise, although the original consideration of the account or promise accrued during the war, and the parties were at that time under different and opposing flags.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. LOUIS WYETH.

This case was before this court at its December term, 1877, and may be found reported in 60 Ala. 568-71. The action was brought by James Hickman, against John D. Weeden, as the executor of the last will and testament of William Acklen, deceased; and was commenced on the 4th April, 1874. The complaint claimed \$291.09, "due by account between the plaintiff and said William Acklen, on the 21st March, 1864;" and "the further sum of \$191.09, due by account for money paid by plaintiff for said William Acklen in his life-time, and at his request, on the 21st March, 1864, which is entitled to a credit of \$20 paid by said Acklen on the 10th November, 1869;" and "the further sum of \$374.55, due him on account stated between him and said Acklen in his life-time, to-wit, on the 10th November, 1869." The defendant pleaded, "in short by consent, 1st, *non assumpsit*; 2d, payment; 3d, the statute of limitations of three years, the cause of action being an open account; 4th, the statute of limitations of six years; 5th, accord and satisfaction." The plaintiff took issue on the first, second, and

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fifth pleas; replied to the third, that on a statement of accounts between plaintiff and said Acklen, on the 10th November, 1869, the balance now sued for was ascertained to be due to plaintiff, and Acklen promised to pay it; and to the fifth, that on said statement of accounts, a balance in favor of plaintiff being ascertained, Acklen promised to pay it, and made a partial payment of \$20 on said 10th November, 1869.

On the trial, as appears from the bill of exceptions, the plaintiff read in evidence an account in his favor against said William Acklen, which contained, under date of March 21st, 1864, the following items: "Paid hauling 24 B. C. to Beirne's \$182.70;" "Baling, rope, and twine, for 24 B. C. \$108.39;" together amounting to \$291.09, with interest added, "3 years, 4 mos., \$83.77;" making a sum total of \$374.53. Indorsed on this account were two memoranda, one signed by J. V. A. Hinds, and the other by said James Hickman; the first being in these words: "*The above is correct, by the books of James Hickman, as kept by me, October 30th, 1867;*" and the other: "*Huntsville, Alabama, twenty dollars on the within account.*" The evidence in reference to this account, and these indorsements, is thus stated in the bill of exceptions:

"On the trial of this cause, the plaintiff introduced James V. A. Hinds as a witness, who testified that, in the year 1864, he was the plaintiff's book-keeper and agent; that in February, 1864, in Madison county, Alabama, he, as such agent, contracted with defendant's testator for the purchase of all his crop of cotton, supposed to be about forty bales, on the following terms and conditions: to pay twenty cents per pound, and one-half the rise, to furnish the baling, rope and twine for baling, and to haul said cotton to town without charge; that he, as such agent, pursuant to said contract, furnished baling, rope and twine, sufficient to bale said Acklen's whole crop of forty bales; that he received from said Acklen sixteen bales of cotton, and no more, and, soon after the delivery thereof, paid said Acklen for the same; that the gin on said Acklen's premises became broken, or out of order, so that witness, as agent of said Hickman, had the remainder of the cotton hauled to the gin on the plantation of George P. Beirne, where it was ginned and baled; that he received no more than the sixteen bales, for which he paid; that the account sued on is for the bagging, rope and twine, for the baling of the twenty-four bales which Acklen failed to deliver, and for the hauling above stated; and that said account is in the handwriting of witness, and was taken by him from the books of said Hickman, and is correct. The account was then read in evidence, as follows," setting out

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the account above described. "Said witness then testified, that the first indorsement on said account was in his handwriting; that, having refreshed his memory by reading said memorandum, he could now testify from memory that said statement was true, and that the same was correctly dated October 30, 1867, and that he drew off said account from the books of the day of the date of said memorandum; that on or about the 30th October, 1867, he presented said account, with said indorsement on it, to said Acklen, at his residence in Huntsville; and that said Acklen admitted that he owed the account, and that said account was correct. Thereupon, plaintiff offered to read in evidence the said memorandum, or indorsement, dated October 30, 1867. To this the defendant objected, because said memorandum was not legal evidence; admitting that the witness could refer to said memorandum to refresh his memory, but insisting that the same could not be properly received as evidence, because it was an *ex-parte* statement of the witness. The court overruled the objection, and admitted the memorandum; to which the defendant excepted.

"The witness further testified, that several years afterwards, some four or five years, the plaintiff came to Huntsville, from Nashville, and, at his request, witness went with him to the residence of said Acklen in Huntsville; that the account was the subject of conversation between Hickman and said Acklen; that Hickman told Acklen, he must have some money to go home on, and did not have money to pay his expenses; that Acklen thereupon handed something to Hickman, but he (witness) can not say whether it was a bank-bill, or the account sued on, or both; that he does not remember what it was; and that Acklen, when he handed this *something* to plaintiff, said, 'I will pay you the balance soon.' The witness said, that he could not remember the day, the month, or the year, when he went with Hickman to see Acklen; and that the second indorsement on said account" [the credit of \$20] "was in the handwriting of said Hickman. The court allowed the witness, against the objection of the defendant, to testify that he saw Hickman make said indorsement on said account, in Huntsville, on the same day, and soon after he and Hickman left Acklen's house, and went up town on the public square; to which ruling the defendant excepted. The court also allowed the witness, against the objection of the defendant, in the presence of the court and jury, to look at said indorsement in the handwriting of Hickman, and refresh his memory by the use of said memorandum, and then to testify, against the objection of the defendant, that the said visit of witness and Hickman to said Ack-

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len was made on the 10th November, 1869. The defendant objected to this evidence of the date of said visit, and his reference to said indorsement to refresh his memory; because the effect was, indirectly, to get said indorsement before the jury; and because no memorandum, made by said Hickman, could be properly referred to by said witness; and because it was not shown that the witness knew said indorsement was true. These objections were overruled, and the defendant excepted. After the argument of counsel was concluded, the court charged the jury, that said indorsement on the account, dated November 10th, 1869, was not evidence.

"The witness testified, also, on cross-examination, that the cotton purchased by him, as the agent of Hickman, from Acklen, was to be shipped from Huntsville, Alabama, to Nashville, Tennessee; that the sixteen bales received were so shipped; that Acklen resided at Huntsville throughout the late war between the States, and adhered to and supported the government of the Confederate States; that Hickman resided at Nashville, Tennessee, throughout the war, and adhered to and supported the United States; that the Confederate forces had charge and control of Huntsville and Madison county at the time said contract was made about the cotton, and the Federal soldiers had charge and control of Nashville, Tennessee; that Hickman was under the Federal flag, and Acklen was under the Confederate flag; and that the contract, and all the conversation about the cotton, bagging and twine, were had in Huntsville. This was all the evidence. The defendant's counsel argued, that the contract and account sued on were void, as against public policy, and because Hickman and Acklen were alien enemies, and because said contract was 'for the transportation of goods in a State declared to be in insurrection against the United States;' and defendant's counsel cited, and handed to the court, 2 Brightley's Digest (U. S. Laws, 1857-65), p. 195, § 29. The court looked at the section, and said to the jury: 'I charge you, that Brightley's Digest, and this question of alien enemy, have nothing to do with the case;' to which charge the defendant excepted."

The rulings of the court on the evidence, to which exceptions were reserved, as above, and the charge to the jury, are now assigned as error.

WALKER & SHELBY, for the appellant, cited the following authorities: 1. As to the rulings on evidence: *Kelseu v. Fletcher*, 48 N. H. 282; *Haven v. Wendell*, 11 N. H. 112; *State v. Shinborn*, 46 N. H. 504; *Vastbinder v. Metcalf*, 3 Ala. 100; *Olds v. Powell*, 10 Ala. 399; *Rutherford v. Br. Bank at Mobile*,

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14 Ala. 92; *Russell v. Hudson Railroad Co.*, 17 N. Y. 134; *Meacham v. Peel*, 51 Barbour, 65; *Rogers v. Burton*, Peck's (Tenn.) R. 108; *Beets v. State*, Meigs, Tenn. 106; *McGehee v. Greer*, 7 Porter, 538; *Knight v. Clements*, 45 Ala. 94; *Crawford v. Br. Bank*, 8 Ala. 79; 1 Wharton's Ev. 521-2; *Coffin v. Vincent*, 12 Cushing, 98. 2. On the question of alien enemy: *Cutner v. United States*, 17 Wallace, 517; *McKee v. United States*, 8 Wallace, 163; *Dismore v. United States*, 3 Otto, 605.

HUMES & GORDON, *contra*, cited *Ware & Cowles v. Dudley*, 16 Ala. 742; *Walker v. Driver*, 7 Ala. 679; *Langdon v. Roane*, 6 Ala. 578.

STONE, J.—The law recognizes the right of a witness to consult memoranda in aid of his recollection, under two conditions: *First*, when, after examining a memorandum made by himself, or known and recognized by him as stating the facts truly, his memory is thereby so refreshed that he can testify, as matter of independent recollection, to facts pertinent to the issue. In cases of this class, the witness testifies to what he asserts are facts within his own knowledge; and the only distinguishing difference between testimony thus given, and ordinary evidence of facts, is that the witness, by invoking the assistance of the memorandum, admits that, without such assistance, his recollection of the transaction he testifies to, had become more or less obscured. In cases falling within this class, the memorandum is not thereby made evidence in the cause, and its contents are not made known to the jury, unless opposing counsel call out the same on cross-examination. This he may do, for the purpose of testing its sufficiency to revive a faded or fading recollection, if for no other reason.

In the second class are embraced cases in which the witness, after examining the memorandum, can not testify to an existing knowledge of the fact, independent of the memorandum. In other words, cases in which the memorandum fails to refresh and revive the recollection, and thus constitute it present knowledge. If the evidence of knowledge proceed no further than this, neither the memorandum, nor the testimony of the witness, can go before the jury. If, however, the witness go further, and testify that, at or about the time the memorandum was made, he knew its contents, and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. The two are the equivalent of a present, positive statement of the witness, affirming the truth of the contents of the memorandum.—1 Greenl. Ev. §§ 436-7; *Bondurant v. Bank*, 7 Ala. 830.

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Under these rules, the Circuit Court erred in allowing the memorandum to be given in evidence to the jury. The court erred, also, in allowing the witness to refresh his recollection, by the credit indorsed in the handwriting of Hickman. True, he stated he saw the indorsement made; but he did not testify that he knew, or ever had known, it contained a true statement of the facts. If he had testified that he saw the indorsement made, and observed its contents, and knew at the time that they were true, this would have brought the testimony within the second of the rules states above, and would have let in both the testimony and the memorandum, notwithstanding the witness, at the time of the trial, had no independent recollection of the facts shown by the indorsement.

The foregoing covers all the questions presented in the briefs, and all the questions that appear to be material. Under the pleadings, and the tendency of the testimony, it would seem that the plaintiff's reliance for a recovery is on an account stated, and on a promise, or partial payment, or an acknowledgment, to intercept the running of the statute of limitations. The testimony bearing on these questions places them after the close of the war, and hence no question of alien enemy, or opposing flags, can arise. If Hickman and Acklen belonged to opposing, belligerent nationalities, or organized forces, at the time the latter had the use and benefit of the labor and merchandise which are the consideration of the alleged promise to pay, hostilities had ceased, and peace had been re-established, long before the alleged accounting took place, or the asserted partial payment and promise to pay are claimed to have been made. If plaintiff has failed to establish his right to recover, by what took place after the close of the war, his claim is barred by the statute of limitations. This renders it unnecessary to inquire whether the account, when contracted, was between alien enemies. The accounting or payment afterwards, if made, healed that infirmity.

Reversed and remanded.

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Trespass for Wrongful Taking of Personal Property.

1. *Plea of not guilty; what evidence admissible under.*—On the former appeal in this case (51 Ala. 504), it was rightly ruled, that in an action of trespass *de bonis asportatis*, under the plea of not guilty, the defendant can not be allowed to prove, in mitigation of damages, or for any other purpose, that the act complained of was done under legal process.

2. *Justification under legal process; what constitutes.*—When the defendant, in such action, pleads justification under mesne process (as the levy of an attachment), after the return day of the writ, he must aver and show the due return of the process, or a sufficient excuse for the failure to return it.

3. *Same; what will excuse failure to return process.*—A compromise of the attachment suit between the parties thereto, made after the levy, by which a portion of the property seized was delivered to the plaintiff therein, and the residue restored to the defendant, or left for him where it then was, nothing being said as to the disposition of the suit, is not a sufficient excuse for the failure to return the attachment.

4. *Compromise of attachment suit; how available in defense of trespass for levy.*—Such compromise of the attachment suit, and its performance, are not a bar to the action of trespass on account of the levy; though the partial restitution of the property, under the compromise, is good matter in mitigation of damages, under the plea of not guilty.

5. *Agency; how proved.*—Agency can not be proved by the mere declarations of the person assuming to act as agent, though it may be inferred from his previous employment in similar acts, or from subsequent acquiescence.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. LUTHER R. SMITH.

This action was brought by Mrs. Ann M. Womack, against William P. Bird, to recover damages for the wrongful taking of "twelve bales of lint cotton, averaging 500 lbs. per bale, five hundred bushels of corn, two hundred and fifty bushels of cotton-seed, and twenty-two thousand pounds of unginned cotton, or cotton in the seed;" and was commenced on the 1st April, 1869. The defendant pleaded not guilty, and issue was joined on that plea; and the defendant had a verdict and judgment, which was reversed by this court on appeal, at its June term, 1874, and the cause remanded, as shown by the report of the case in 51 Ala. 504. After the remandment of the cause, the defendant filed two special pleas, as follows:

"2. That on or about the 17th December, 1867, a certain writ of attachment was issued by D. B. Butler, clerk of the Circuit Court of Greene county, Alabama, which was in words and figures as follows;" setting out an attachment in favor of Bell & Moore, against Ann M. Womack and Lowndes Wo-

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mack, dated said 17th December, 1867, returnable to the next term of the Circuit Court, and directed to "any sheriff of the State." "That on said 17th December, 1867, there being no sheriff or coroner in and for said county, this defendant was appointed by Hon. W. C. Oliver, judge of the Probate Court of said county, special coroner to levy said attachment, by an order indorsed on said writ, in words and figures following: 'There being no sheriff, Wm. P. Bird is hereby deputized to act as special coroner in this case, the plaintiff waiving that he should give bond, December 17, 1867,'" signed "*W. C. Oliver*, judge P. C. G. C." "That said attachment, with said indorsement thereon, was placed in the hands of this defendant, who is the Wm. P. Bird named in said appointment and indorsement; and afterwards, to-wit, on the 19th December, 1867, under and by virtue of authority of the said writ, and said appointment as special coroner, this defendant, acting in the discharge of the duties of sheriff, levied said writ on a lot of corn and cotton, as the property of the defendants in said writ, which levy was indorsed on said writ, as follows," setting it out. "That the plaintiff in this suit was one of the defendants in said attachment suit; that said attachment was not levied on any other property whatsoever, except as set forth in said levy and return; that said levy, as indorsed on said attachment, was made by this defendant, as such special coroner, in the discharge of his duty as an officer of the law, under said writ and appointment, and in no other way or capacity; that said writ, with said levy indorsed, was by this defendant duly returned to said Circuit Court, according to the mandate of said writ; and that said levy of said attachment by this defendant, as special coroner as aforesaid, and no other act or thing whatever, constitutes the said supposed trespass," &c.

"3. That all of the alleged trespasses, charged against this defendant in the plaintiff's complaint, consisted in the levy by this defendant, acting as special coroner, of a writ of attachment on certain cotton and corn of the plaintiff in this suit, who was a defendant in said attachment suit; that said attachment suit was compromised and settled, by and between Bell & Moore, the plaintiffs in said attachment, and said Ann M. Womack, one of the defendants therein; by which compromise and settlement, the cotton levied on was agreed to be, and was, turned over to the said Bell & Moore, to be by them sold, and applied towards the payment of the debt of said Ann M. Womack to said Bell & Moore, sued for in said attachment suit; which was accordingly done, and the said Ann M. Womack duly credited by said Bell & Moore with the net proceeds of said cotton; and that by said com-

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promise and settlement, the levy on the corn was to be released, and said corn left where it was when said levy was made; and said levy on said corn was released accordingly, and the corn left where it was when levied on under said attachment."

The plaintiff demurred to each of these special pleas; assigning several grounds of demurrer to the second, which, in substance, alleged that the order of the probate judge, appointing the defendant special coroner, was void, and gave him no authority to levy the attachment; and to the third the following were specially assigned as causes of demurrer: 1. "Because it does not allege that said writ was returned according to its mandate, or that it was returned to court." 2. "Because it does not allege that said writ was returned according to its mandate, nor that said defendant was a party to said compromise, nor that said compromise was before the beginning of this suit." 3. "The taking of said corn and cotton by virtue of said attachment, as alleged, without alleging its return, and said alleged compromise thereafter, are not sufficient to justify said trespass; and if available at all to the defendant, could only go in mitigation of damages, under the general issue." 4. "It is no justification of said trespass, that said plaintiff made said compromise with Bell & Moore as alleged, when said plea shows that said defendant took said corn and cotton by virtue of a certain writ of attachment, acting as special coroner; and said plea does not allege that said writ was returned according to its mandate, nor show by what authority said defendant was acting as special coroner, nor by whom appointed, nor for what county." 5. "Said plea is double, justifying under said writ, and then under said compromise." The court overruled the demurrers, and issue was then joined on these special pleas.

On the trial, as the bill of exceptions shows, when the defendant offered in evidence the said writ of attachment, the plaintiff objected to its admission, because, as shown by an indorsement on it, it was not returned until the 26th April, 1869, which was after the commencement of this suit; but the court overruled the objection, and admitted it; to which the plaintiff excepted. It appeared that, after the seizure of the cotton and corn by the defendant, under the attachment, after the tenants on the lands had been allowed to remove the part claimed by them, the residue of the cotton was forwarded by the defendant to said Bell & Moore, and the corn was left on the place, where it seems to have been wasted, and carried away partly by unknown persons. The corn was thus left on the place, and the cotton sent to Bell & Moore, under some arrangement between said Bell & Moore

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and one John V. Wright, who was the son-in-law of the plaintiff, and assumed to act for her in the matter, but without any authority from her, as he testified; and he stated that he proposed the arrangement on his own responsibility, and without consulting the plaintiff about it, because he wanted to obtain the corn for his own use, and thought he could induce her to assent to it; but, when he returned to the plantation, where he supposed the corn was, he found that it had all been carried away, and he therefore gave no more attention to the proposed settlement, or compromise. The plaintiff testified, as a witness for herself, that said Wright was not her agent in the matter, and had no authority to act for her; and that she never assented to the said arrangement, or ratified it. The defendant testified, in his own behalf, "that he shipped the cotton, after it was ginned and packed, amounting to nearly eight bales, to said Bell & Moore, commission-merchants, at Mobile, some time in the spring of 1868, by virtue of a compromise between said Bell & Moore and John V. Wright, who represented himself as acting as the agent of the plaintiff in this suit; that by said compromise it was agreed, that the cotton was to be shipped to them, the levy on the corn released, and the corn left where it was, for the plaintiff's benefit; that he was not himself present at said compromise, but learned its terms from said Wright, who represented himself as plaintiff's agent, and also from a letter of instructions from said Bell & Moore. The plaintiff objected to said Wright's declarations, as proof of agency; but the court overruled the objection, on the defendant's counsel stating that he would introduce other proof of agency, and show plaintiff's knowledge that said Wright was acting as her agent; to which ruling plaintiff duly excepted."

The bill of exceptions purports to set out all the evidence, and then adds: "This being all the evidence, the court charged the jury, among other things, that if they believed, from the evidence, that the defendant, in taking said corn and cotton, acted under and by virtue of said writ of attachment, and the order indorsed thereon by W. C. Oliver, who was then the probate judge of said county, then, by virtue of said writ and order, he was not guilty of trespass, but was justified by the process under which he acted; that if he abused the process under which he acted, and suffered the cotton and corn to be wasted and destroyed by his neglect, then he was responsible in damages to the plaintiff, to the extent of the loss which she had sustained by reason of such neglect. Also, that if they believed, from the evidence, that said Bell & Moore, the plaintiffs in the attachment suit, made

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a compromise with John V. Wright, and that he had authority to act as plaintiff's agent, then the plaintiff would be bound by the said compromise; and if the compromise was, that the cotton should be turned over to said Bell & Moore, in satisfaction of the debt in the attachment suit, and it was so turned over to them, and that the corn was to be restored to the plaintiff, or left where it was at the time of making said compromise, for her benefit, and said compromise was carried out in good faith by said Bell & Moore, then the defendant would not be liable in this action." To this charge the plaintiff excepted.

The rulings of the court on the pleadings and evidence, as above stated, and the charge to the jury, are now assigned as error.

COLEMAN, CLARK & McQUEEN, for appellant.—1. The demurrer to the second plea (the first special plea) was well taken, and ought to have been sustained. The appointment as special coroner was void on its face, and gave the defendant no authority to execute the attachment, which was directed "to any sheriff."—*Gresham v. Leverett*, 10 Ala. 384; *Governor v. Lindsay*, 14 Ala. 658; *Pope v. Stout*, 1 Stew. 375.

2. The demurrer to the third plea, or second special plea, ought to have been sustained. The facts stated in said plea do not show a justification of the trespass.—*Hamner v. Wilsey*, 17 Wendell, 91; *Otis v. Jones*, 21 Wendell, 394; 2 Greenl. Ev. §§ 597, 629, 635, and note.

3. The court erred in allowing the writ of attachment to be read in evidence. This ruling, in effect, allowed the defendant all the benefit of the writ as a defense, as if it had been duly and legally returned.—*Kirksey v. Dubose*, 19 Ala. 43; *Young v. Davis*, 30 Ala. 218; 2 Greenl. Ev. §§ 597, 629.

4. The declarations of Wright ought not to have been admitted as proof of his agency, as shown in the bill of exceptions.—*Strawbridge v. Spann*, 8 Ala. 824; *Bingham v. Peters*, 1 Gray, 145; *Mussey v. Bucher*, 3 Cush. Mass. 517; 2 Greenl. Ev. §§ 60, 63, 114.

5. The court erred, also, in the instructions given to the jury.—Authorities first above cited; also, *Hartshorn v. Williams*, 31 Ala. 155; *Ross v. Philbrick*, 39 Maine, 29; 2 Greenl. Ev. §§ 579, 635; *Griel v. Hunter*, 40 Ala. 542.

E. MORGAN, *contra*.—1. Under the act of 1839, "any process," when required to be executed by the coroner, was also required to be directed to him (Clay's Digest, 336, § 133); and the cases in 10th and 14th Ala., cited for appellant, were decided under this statute. The Code of 1852 (§§ 2844, 2570),

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and subsequent statutes, continue this provision only as to writs of execution and summons, thereby excluding other process. Besides, if the writ was misdirected, the defect was only matter of abatement.—3 Ala. 728; 1 Ala. 590; 8 Porter, 55; 60 Ala. 416.

2. The mere failure to return the attachment, according to its mandate, did not deprive the defendant of the protection afforded by the writ. Mere non-feasance does not convert a lawful act into a trespass *ab initio*.—40 Ala. 545. When the compromise was made, and fully carried into effect, the defendant might well suppose that the writ had spent its force, and that his duties in connection with it were ended. He filed the writ, after this suit was brought, for his own protection, as he might lawfully do.—4 N. H. 532. The court might hear and allow his excuse for not making due return of the writ.—2 Porter, 229; 2 McMull. S. C. 1. To make an officer a trespasser *ab initio*, he must abuse the same authority under which he originally acted.—15 Vermont, 509.

3. The attachment was regular, and the property seized was subject to it. The compromise was made in good faith, and was fully carried into effect on the part of the plaintiffs in attachment. The jury, by their verdict, found that Wright was the plaintiff's agent in making it, or that she ratified it; and she has certainly got the benefit of it. On these facts, she has suffered no injury by any erroneous ruling, and the verdict of the jury ought not to be disturbed.

STONE, J.—When this case was formerly in this court (51 Ala. 504), it was rightly settled that, under the plea of not guilty of a trespass *de bonis asportatis*, the defendant can not be allowed to prove, in mitigation of damages, or for any other purpose, that the act complained of was done under legal process. As the record then stood, it presented only the single plea of not guilty. When the case returned to the court below, a second plea was interposed, justifying the seizure of the goods under an attachment for debt, which, the plea averred, was returned to the court from which it issued, according to the mandate thereof. When the case was on trial, and the attachment was offered in evidence under the plea of justification, it was shown and admitted, that the attachment was not in fact returned, until some sixteen months after its issue, before which time this suit had been commenced. The authorities are unbroken that, to maintain the defense of seizure under mesne process, the officer invoking it must have duly returned the process, within the time prescribed by law, or must show a sufficient excuse for not doing so. In *McAden v. Gibson*, 5 Ala 341, this court

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said: "It is insisted that the second and third pleas are bad, because they do not allege that the attachments, under which the defendant justifies the detention of the slaves in question, were returnable, or in fact returned to any court. It has been held, in many English cases, that an officer can not justify under mesne process, after the day appointed for the return, without showing that it was returned, although with respect to writs of execution the law is otherwise. . . . The cases cited show the rule, as stated, to be too firmly settled to authorize us to refuse its recognition. When restricted in its application to the officer charged with the return of the process, it can be productive of no injury or inconvenience. But, even in such cases, we will not say that it would not be allowable for the officer to excuse the return of a writ, by alleging its loss, or something, the effect of which would be to prevent its return, without the fault of the party charged with that duty." In *Kirksey v. Dubose*, 19 Ala. 43, it was said: "It is well settled, that if a sheriff justifies under mesne process, after the time appointed for its return, he must either aver its return, or show some legal excuse why it was not returned."—See, also, *Young v. Davis*, 30 Ala. 213; *Rowland v. Veale*, 1 Cowp. 18; *Clark v. Foxcroft*, 6 Greenl. 296; *Russ v. Butterfield*, 6 Cush. 243; *Williams v. Babbitt*, 14 Gray, 141; 2 Greenl. Ev. § 597.

The attachment was levied on cotton and corn; and the defendant introduced testimony tending to show that, after the levy, and before the return day of the attachment, the plaintiffs in attachment and the agent of the defendant (plaintiff in this suit) agreed on terms of compromise; by which it was agreed, that the corn was to be released from the levy, and left where it was seized, for the benefit of defendant, and the cotton was to be delivered to the plaintiffs in attachment. Nothing was said as to what was to become of the attachment suit. There was testimony, denying the making of such agreement of compromise, and disputing the agency under which it was claimed to have been made. The officer, Bird, delivered the cotton to plaintiffs in attachment. The proof tends to show that some of the corn had been removed, and disposed of by the officer, before this agreement was made. It is not shown what became of the residue of the corn. These facts are relied on, as an excuse for not returning the attachment, and as an equivalent of the averment in the plea that the attachment was duly returned. We do not think this a sufficient excuse for not returning the attachment; and hence we hold, that the Circuit Court erred in allowing the attachment and levy to go in evidence to the jury.

The questions raised on the appointment of the special
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coroner, and on the direction of the attachment, are rendered immaterial by this ruling. We may add, however, that we are not convinced there is any thing in those objections, under the statutes of force when the attachment was issued and levied, and still unchanged. But we need not, and do not, decide these questions.

The third plea does not set out, or state, the contents of the attachment, under which the levy was made, nor does it set forth the authority under which the special coroner acted. Hence, it is not a plea of justification under process. There is nothing in this plea, which shows the attachment was issued by an officer authorized to issue it, or that it was so framed as to authorize such levy, or that Bird, who levied it, had any authority therefor. Its sufficiency, as a defense, rests on the alleged compromise, the terms of which are stated above. Its language is, "by which compromise and settlement, the cotton levied on was agreed to be, and was turned over to said Bell & Moore" [plaintiffs in attachment, "to be by them sold, and applied towards the payment of the debt of said Ann M. Womack to said Bell & Moore, sued for in said attachment suit; which was accordingly done, and the said Ann M. Womack duly credited by said Bell & Moore with the net proceeds of said cotton; and that by said compromise and settlement, the levy on the corn was to be released, and said corn left where it was when said levy was made; and said levy on said corn was released accordingly, and the corn left where it was when levied on under said attachment." It is not averred that Mrs. Womack agreed, as one of the terms of the compromise, to surrender or abandon any claim she may have had for damages, for the trespass and seizure of her goods; but the plea seeks to give this effect to the compromise, beyond the letter of the alleged agreement. This is extending the effect of the compromise too far. One whose property has been tortiously taken, may receive it back, in whole, or in part, or may consent to have it turned over to another, without impairing his right, thereby, to sue for the trespass. Restoration of the goods does not heal the wrong done by the trespass.— *Ewing v. Blount*, 20 Ala. 694. Such restoration of possession to the owner, or resumption by him, is a proper inquiry in mitigation of damages. It is no bar to the action. The demurrer to the third plea should have been sustained.— 2 Greenl. Ev. § 635a. As mitigation, testimony of the delivery of the chattels to Mrs. Womack, or to another with her authority, or that of her authorized agent, was allowable under the general issue.

Agency can not be established by the mere declarations of the one assuming to be agent. It may be implied from his

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previous employment in similar acts, or from subsequent acquiescence.—*Fisher v. Campbell*, 9 Por. 210. It is, like any other disputable fact, always a question for the jury, when it is sought to be established by parol proof.—1 Brick. Dig. 55, § 281.

Reversed and remanded. This judgment to take effect as of February 13, 1877, when this cause was submitted.

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Detinue for Mule.

1. *Parol mortgage*.—As between the parties, a valid mortgage of a chattel may be created by parol, and no particular form of words is necessary: a verbal agreement between the seller and the purchaser of a mule, that the former shall have a mortgage on the mule, if the note for the purchase-money is not paid at maturity, is a valid parol mortgage.

2. *Parol evidence of terms outside of written contract; subsequent modification of contract*.—Where the purchaser of a mule, having executed and delivered his note for the price, and having received the mule, “immediately after the execution of his note, and as he was about to leave with the mule, verbally agreed” with the seller that the latter “should have a mortgage on the mule to secure payment of the note;” held, that this agreement, being outside of the contract shown by the note, might be proved by parol, and was also valid as a subsequent modification of that contract.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Frank P. Glover, against James McGilvray, to recover a mule, together with damages for its detention; and was commenced on the 6th January, 1879. The defendant pleaded *non detinet*, and issue was joined on that plea. “On the trial,” as the bill of exceptions states, “the plaintiff testified, as a witness for himself, that he bought the mule now sued for, from the defendant, on the 19th October, 1878, and was to pay \$68 for it on the 1st January, 1879; that he gave the defendant his note for that sum, but did not pay it at maturity, and has not yet paid it, though the note is now in his possession; that the defendant sent it to his house, a few days after it became due, and left it there with plaintiff’s wife; that the defendant, about the same time, got possession of said mule without his consent, and has ever since held it, and had it at the commencement of this action; that the value of the mule was \$75, and the value of its hire during its detention, up to

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the time of the trial, was \$10." (And the plaintiff then introduced the said note for \$68, which was dated October 19, 1878, and payable on the 1st January next after date, to James McGilvray, or bearer.) "The defendant then testified, in his own behalf, that immediately after the sale of the mule by defendant to plaintiff, and after the execution and delivery of said note, and as plaintiff was about to leave with the mule, plaintiff verbally agreed with him that he should have a mortgage on the mule, to secure the amount due for the mule, and that if he did not pay the note promptly, on the first day of January, 1879, he would return the mule to the defendant, and the defendant might take him back. The plaintiff objected to this evidence, and moved to rule it out; but his objection and motion were overruled by the court, and he excepted.

"This being all the evidence, the court charged the jury, among other things, that after the consummation of the contract, the parties still had a right to modify or change it; and if they believed, from the evidence, that the plaintiff, after the sale and the execution of the note, then and there agreed that, for security to defendant, the mule was to remain his property, and that the defendant should have the right to take the mule back, then the plaintiff is not entitled to recover. The plaintiff excepted to this charge, and requested the following charge, which was in writing: 'Even if the jury believe, from the evidence, that immediately after the sale and delivery of the mule to plaintiff, and the execution and delivery of the note by plaintiff to defendant, the parties verbally agreed that the mule should remain the property of the defendant until said note was paid, this does not constitute a verbal mortgage on the mule, and does not authorize the defendant to take and keep the mule.' The court refused this charge, and the plaintiff excepted."

The admission of the evidence objected to, the charge given, and the charge refused, are now assigned as error.

J. M. MCKLEROY, for appellant.—The note shows the entire contract between the parties, and parol evidence could not be received to vary or add to its terms. If any verbal agreement, as the defendant testified, it was "immediately after" the execution of the note, and, hence, was part and parcel of the same contract; and not being included in the writing, no effect can be given to it. When an asserted verbal contract follows "immediately after" the execution of a written contract between the same parties, they cannot be construed as two separate contracts. That the evidence ought not to have been received, see 2 Parsons on Notes and Bills, 501,

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and authorities cited in note *b*; *Ware v. Cowles*, 24 Ala. 446; *Hart v. Clark*, 54 Ala. 490; *S. C.*, 49 Ala. 86; 3 Smith's L. C. 729; *Wright v. Remington*, cited in The Reporter, September 17, 1879, p. 369.

JOHN A. FOSTER, *contra*.—The original contract was complete in itself, and no effort was made to vary or add to its terms. The subsequent verbal agreement was simply a new contract, or a modification of the original contract; and its words created a valid parol mortgage.

BRICKELL, C. J.—As between the parties, a mortgage of chattels may be created by parol, and will be valid. No special words are necessary to its creation. It is enough that the transaction clearly indicates an intention and agreement that the chattel shall stand as a security for a debt. *Morrow v. Turney*, 35 Ala. 131. Whether it was part of the contract of sale, or a subsequent agreement, that the defendant should have a mortgage on the mule, and that the plaintiff would return it to him, if the note for the purchase-money was not paid when due, a mortgage was created, and the defendant had the right to the possession of the mule on the failure of the plaintiff to pay the debt. It was not an agreement to give a mortgage in the future, the parties intended, but a present security, to the operation of which, no other or further act was necessary.

Though a note in writing was given for the purchase-money, not expressing that there was a security for its payment, the oral evidence of the mortgage was not inconsistent with, or repugnant to it. Contracts may rest partly in writing, and partly in parol; and when but a part of the contract is reduced, or intended to be reduced to writing, the independent part, not incorporated in the writing, may be proved by parol.—2 Whart. Ev. § 1015. Besides, the evidence tended to show that the mortgage was created subsequent to the giving of the note, and was a separate contract. The parties could by parol modify the contract, and such modification needs no new consideration to support it.—*Thomason v. Dill*, 30 Ala. 444.

There is no error in the record, and the judgment must be affirmed.

[Brewer v. King's Sureties.]

Brewer v. King's Sureties.

Summary Proceeding on Tax-Collector's Official Bond.

1. *Tax-collector's official bond ; liability of sureties.*—The general law of 1868, regulating elections, required a tax-collector to be elected, in each county, on the first Tuesday after the first Monday in November, 1871, "and every three years thereafter," but did not expressly declare when their term of office should begin or end. The subsequent statute of December 17, 1873, "relating to the term of office of the several tax-collectors," after providing that collectors thereafter elected should enter on the discharge of their duties on the second Monday in April next succeeding their election, further enacted "that the term of office of the several tax-collectors now in office *shall continue until the second Monday in April, 1875 ; provided, that such tax-collectors shall execute bonds, with sufficient sureties, in the form now prescribed by law, for the faithful discharge of their duties as such during their respective terms of office as hereby extended.*" *Held*, that the sureties on the official bond of a collector who was elected in 1871, and who did not give a new bond under the act of 1873, were not liable for a default of their principal committed during the interval between November, 1874, and April, 1875. (BRICKELL, C. J. *dissenting*, held that the sureties were liable under the general law declaring the legal effect of official bonds [Code, § 179], which declares that an official bond is obligatory on the principal and his sureties, "for any breach of the condition during the time the officer continues in office, or discharges any of the duties thereof," and "for the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond.")

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. J. Q. SMITH.

This was a statutory proceeding, by notice and motion, for a summary judgment against John R. King, and the sureties on his official bond as tax-collector of Sanford (now Lamar) county ; and was instituted by Willis Brewer, as State Auditor, on the 14th September, 1877. Said King was elected tax-collector of Lamar county, at the general election in November, 1871 ; and his official bond, which was conditioned as required by law, and regularly approved, was dated the 20th November, 1871. The proceeding was discontinued as to King himself, and also as to several of the sureties who were not served with process, and prosecuted only against those who had been legally notified. The defendants pleaded the general issue, and did not demand a trial by jury. The plaintiff proved on the trial, as appears from the bill of exceptions, that the said King had failed to account for and pay into the State treasury moneys amounting to \$1,111.55, which he had collected as such tax-collector. "The defend-

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ants introduced testimony tending to show that said King had lawfully accounted for all the taxes collected prior to the first Tuesday after the first Monday in November, 1874; that after said first Tuesday in November, 1874, when his successor in office was elected, he continued to collect taxes from the citizens of said county; that the taxes so collected by him, in and for the year 1874, he has never paid into the treasury; and that said King had never executed an additional bond as tax-collector, in accordance with the requirements of the act approved December 17, 1873, relating to the term of office of the several tax-collectors of this State. On this evidence, the court rendered judgment for the defendants;” to which the plaintiff excepted, and which is now assigned as error.

H. C. TOMPKINS, Attorney-General, for the appellant.—At the time of King’s election as tax-collector, there was no law of force which provided when his term of office should commence, or when it should terminate; hence, it commenced as soon as he qualified after his election, and continued until his successor was elected and qualified.—*Stratton v. Outlaw*, 28 Cal. 44; *Cordiell v. Frizell*, 1 Nevada, 130. His official bond, then, bound him and his sureties for the faithful discharge of his duties during this entire term—that is, until his successor was elected and qualified; and the general statute declaring the legal effect of official bonds, which is by law incorporated in every bond executed under its provisions, made the sureties bound for any breach of the condition, “during the time the officer continues in office, or discharges any of the duties thereof.—Rev. Code, § 169. In the construction of this statute, effect must be given to each clause and word, and it can not be assumed that each of the two clauses means exactly the same thing. Thus construing it, the first clause makes the sureties liable so long as the term of their principal continues, whether such term be fixed by statute, or exists by reason of the failure of his successor to qualify; and the second makes them liable so long as their principal discharges any of the duties of the office, whether rightfully or wrongfully.

This statute is remedial, and must be liberally construed to advance the remedy, and to prevent the evil which it was intended to guard against, or suppress.—*Sprowl v. Lawrence*, 33 Ala. 674. It was not enacted in the interest of the sureties on official bonds, who had already ample means to protect themselves. It was obviously enacted in the interests of the public, and was intended to remedy defects in the laws then existing. It was first incorporated in the Code of 1852

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(§ 130); before which time, as settled by the decisions of this court, sureties were only held liable for defaults committed by their principal during the term actually prescribed by law, and not for defaults committed while he held over until the qualification of his successor.—*Richardson v. Bean*, 5 Porter, 27; *Cuthbert v. Huggins*, 21 Ala. 349. This was the defect which experience had pointed out in the former laws, the mischief or evil which the new law was intended to suppress; and it is the only field of operation which can be found for it. No question had ever arisen as to the liability of sureties in the event of the resignation of their principal, and no legislation was called for in reference to such cases. King certainly entered on the discharge of the duties of his office under the bond signed by these sureties; he continued in the discharge of those duties under that bond, and he collected the money for which they are now sued in the discharge of those duties—that is, as tax-collector. Whether he collected them rightfully or wrongfully—whether as an officer *de jure*, or as an officer *de facto*—the sureties are equally liable. As bearing on this question, see *Vann v. Pipkin*, 77 N. C. 408; *Newman v. Beckwith*, 5 Lansing, Penn. 80; *Placer Co. v. Dickerson*, 45 Cal. 12; Brandt on Sureties, § 471.

The act of December 17, 1873, did not extend the term of office of all the tax-collectors, absolutely and unconditionally. The proviso required the execution of a new bond, as a condition precedent to the extension; and where no new bond was given, the term of the incumbent was not extended.—*Potter's Dwarries*, 118; *Voorhies v. U. S. Bank*, 10 Peters, 471. As King never gave a new bond, he did not hold over under the extended term allowed by that statute, but simply by virtue of his possession and election. His possession may have been wrongful, but it was under color of office, and in the discharge of official duties, for which these sureties are liable under the general law.

GUNTER & BLAKEY, *contra*.—1. If the act of 1873 had not required tax-collectors to give a new bond, for the additional term of office as extended by that act, the sureties on the bond for the expired term would not be liable for defaults committed after the expiration of the original term. The terms of the contract entered into by the sureties, under the law then of force (Code, §§ 163, 403), would not extend to defaults committed after the expiration of the term for which the bond was given. If section 179 of the Code can operate to make a bond for one term cover a subsequent term, without or against the assent of the sureties, then the power of the legislature in this respect is unlimited, and a bond exe-

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cuted in 1860 can be made to cover defaults committed by the same officer ten years afterwards. There can be no difference, in principle, between an extension of the term for five months, and an extension for five years; nor between an additional term immediately succeeding the expired term, and one occurring after an interval during which the office has been held by another person. The statute does not require or authorize such an unreasonable construction. Its manifest purpose was to prevent the sureties from raising any question as to the legality of their principal's tenure of office—to make them equally liable, during the term for which they bound themselves, whether their principal was a legal officer or a usurper.

2. But any implied extension of the sureties' liability is excluded by the very terms of the act of 1873, which requires a new bond for the extended term; thereby recognizing the fact that the sureties on the original bond would not be bound, and showing an intention that they should not be held bound. The proviso was entirely unnecessary, if the sureties on the old bond were liable for the extended term.—

Wood v. Morrow, 56 Ala. 1.

MANNING, J.—John R. King was elected, in November, 1871, tax-collector of Sanford, now Lamar county; and the defendants in this cause became his bondsmen for the faithful discharge of the duties of the office. The election was had under the act of 1868, "to regulate elections in this State;" according to which, a tax-collector was to be elected, in each county, on the first Tuesday after the first Monday of November in the year 1871, "and every three years thereafter."—Acts of 1868, p. 272, § 8. Defendants are sued for taxes collected by King, after the election, in November, 1874, of another person as tax-collector of that county, and between that time and the second Monday in April, 1875; and they deny liability. King is not a party to the cause, process not having been served on him.

The decision of the case involves a consideration of the meaning and effect of some provisions of the Code, and of the act of December 17, 1873, "relative to the term of office of the several tax-collectors of this State."—Acts of 1873, pp. 36-7. By the first section of this act, it is declared, that the tax-collectors to be elected in November, 1874, and every three years thereafter, should "severally enter upon the discharge of their official duties, on the second Monday in April next succeeding their election;" and the second section "enacted, that the term of office of the several tax-collectors of this State, now in office, shall continue until the second Mon-

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day in April, 1875; *provided*, that such tax-collectors shall execute bonds, with sufficient securities, in the form now prescribed by law, for the faithful discharge of their duties as such during their respective terms of office as hereby extended; and that all laws and parts of laws, in conflict with the provisions of this act, be, and the same are hereby, repealed." King did not give a new bond.

There being no express declaration by statute, prescribing what the term of office of a tax-collector, chosen by the people in 1871, should be, and provision being made for the election of his successor "three years thereafter," the person then elected would be entitled to give bond, and take the oath of office, immediately afterwards, and thereupon become tax-collector in King's stead.—*Cordell v. Frizell*, 1 Nevada, 130. Hence, according to law, as it existed when the bond here sued on was executed, his term of office—that during which his sureties agreed to be bound for his official conduct—was a term of three years. But, it having been enacted, by the subsequent statute of 1873, that the person elected to the same office in November, 1874, should enter upon the discharge of its duties in April, 1875, he was not entitled to do so, and his term of office would not begin, before that time.—*Cordell v. Frizell*, *supra*. Wherefore, by the second section of that act, the legislature undertook to extend the term of his predecessor, then in office, over the intervening period; adding to the enactment, for that purpose, the *proviso* above set forth.

This was, in effect, the creation for him of another term of office of that length. Were the obligations of the sureties, upon the bond executed in 1871, continued thereby beyond the term for which their principal was elected, and through this additional period? Manifestly not, unless certain provisions of the Code, under and in conformity with which their bond was executed, and by which it must be interpreted, show that they consented to such an enlargement by statute of their liability. The legislature could not, otherwise, change the obligations of their contract, or create new ones, any more than it could abrogate or impair those of a contract between individuals.—See *United States v. Kirkpatrick*, 9 Wheat. 720.

By the condition of the bond in this case, conforming to section 157 of the Revised Code (Code of 1876, § 163), the obligors engaged that King should faithfully discharge the duties of his office "during the time he continues therein, or discharges any of the duties thereof." And by section 169 of the Revised Code (Code of 1876, § 179), it is declared: "Every official bond, executed under this Code, is obligatory

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on the principal and securities thereon: 1. For any breach of the condition, during the time the officer continues in office, or discharges any of the duties thereof. 2. For the faithful discharge of any duties which may be required of such officer, by any law passed subsequently to the execution of such bond, although no such condition is expressed therein. 3. For the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office, as by his failure to perform, or the improper or neglectful performance of those duties imposed by law."

The sections cited, it will be observed, are not confined to tax-collectors. They relate to all public officers. Clause 3, last above quoted, is not concerned in the present inquiry. Why the second clause, next preceding that, was incorporated in the statute law, is easily perceived. In the exigencies of society, new interests arise, and services in respect of them become necessary, the performance of which can, most conveniently and properly, be imposed upon existing officers: while, ordinarily, their sureties would not be liable for the faithful discharge of duties which did not belong to the office when they became such, unless such liability were distinctly assumed by them when they executed the bond. But the duties here referred to are those which may be annexed to the office, to be performed during the continuance of the term. They are new, or additional duties, appropriate to the office, not the same that originally pertained to it, and an extension by statute of the obligation of the bondsmen for the performance of them through a longer period than the term for which the officer was elected.—*Mayor of Camb. v. Dennis*, Ell., Bl. & El. 660. The 1st clause next preceding that just mentioned, of section 179, is the one to be chiefly considered.

By declaring the obligors liable for any breach of the condition, "during the time the officer continues in office, or discharges any of the duties thereof," it may have been intended to recognize his right to resign, and discontinue the discharge of such duties, and the State's right to remove and dismiss him according to law; after which, the liability of the bondsmen should cease, although his term of office had not run out. So, if, while in office, he had begun the execution of some duty, which was not finished when his term expired, it would be his right, under the law, to complete, after the term was ended, what was thus begun during its continuance. Or the officer might be authorized by law to hold over, during the short time after the election of his successor, which the latter might need to enable him to give the bond and take the oath of office. In which latter cases, the

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sureties would continue bound for the acts of their principal during that interval. There is thus a field for the operation of this clause, without supposing with the Attorney-General, that it was the purpose to secure thereby to the State the right, by a subsequent act, to extend the obligations of the sureties, through another term of office, long or short, with which the legislature might undertake to invest their principal. If it was intended to secure to that body such authority as this, it is not to be supposed that a provision of so much importance, and which could be so easily expressed in plain words, would not be declared in unmistakable language. To hold that the words used conceded to the legislature the power to bind King's sureties for another term of office of five months, conferred by it upon him, would be an admission that it might, by successive enactments, continue him in office five years; or fifteen years longer, if the constitution did not hinder; and that the sureties would be as much bound for the prolonged period, as for the shorter one. As was said by Ch. Justice BEASLEY, of New Jersey: "I know no case, in which such an amplitude of responsibility has been thrown upon a surety, except when the terms of the obligation would admit of no other result."—*Citizens' Loan Association v. Nugent*, 11 Vroom, 215.

The interpretation contended for is not reconcilable with the rule for the construction of such clauses, established by the decisions in *Lord Arlington v. Merricke* (3 Saund. 403), and the numerous cases following it; according to which, provisions of that kind (and whether in statutes, or the conditions of bonds, their meaning is just the same), must be understood as restricted by the nature and duration of the offices to which they relate; or, to be more precise, though the obligatory words be "so broad that, intrinsically considered, they covenanted for the good behavior of the principal obligor, during the whole period of his remaining in the designated office, nevertheless the efficacy would be restricted to his current term, when such term was for a determinate period."—*Mayor v. Crowell*, 11 Vroom, 207. "Can we say," asked MANSFIELD, C. J., concerning the sureties in another case of the kind, "that they intended to be bound for an indefinite period?"—See, also, *Liverpool Water-Works v. Atkinson*, 6 East, 507; *Wardens, &c. v. Bostock*, 5 Bos. & Pul. 175; *Leadley v. Evans*, 2 Bingh. 32; *Peppin v. Cooper*, 2 B. & Ald. 431; *Kiton v. Julian*, 4 El. & Bl. 854; *Com. v. Fairfax*, 4 Hen. & Munf. 208; *Munford v. Rice*, 6 Munf. 81; *State v. Wyman*, 2 Gill & J. 254; *Welch v. Seymour*, 28 Conn. 387; *Chelmsford v. Demarest*, 7 Gray, 1; *Dover v. Twombly*,

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42 New Hampshire, 59; *Bramford v. Iles*, 3 Wels., Hurl. & G. 380.

There are two limitations, within which the bondsmen of a public officer, who is elected for a term of service prescribed by law, certainly understand that they are impreguably intrenched, and beyond which their liability can in no event be carried. One of these limitations is of the amount, the total sum, which shall be the extreme measure of their responsibility: and the other is of the time during which they shall be answerable for any official misconduct, neglect, or default of their principal. Their engagement is to the amount of the penalty written in the bond, and for the term of office prescribed by law, and goes no further, unless it be plainly declared that it shall. These land-marks of their liability are of so great importance, that not even the legislature may remove them, without the consent, clearly secured, either in advance or subsequently, of the bondsmen themselves. We do not find it given in the clauses of the Code, which are relied on as showing it. On the contrary, it would seem that the enlarged responsibilities which they, and especially clause 3, above quoted, impose on the sureties, disclose good reasons why these limitations of time and amount, which appear to us to be essential parts of their contract, should be the more carefully maintained. The statute of 1873 itself recognizes such limitations, in expressly requiring, by its proviso, a new bond to cover the duties of the term as extended. For the effect of such a provision, notwithstanding the express enactment by clause 2 above quoted, in respect of duties imposed on the officer during his term, by acts passed after execution of his bond, see *Morrow v. Wood*, 56 Ala. 1; also, *U. S. v. Cheeseman*, 3 Sawy. 424; *Commonwealth v. Toms*, 45 Pa. St. 408.

Let the judgment of the Circuit Court be affirmed.

BRICKELL, C. J.—I cannot assent to this opinion. My view of the question may be found in the case of *Morrow v. Wood*, 56 Ala. 7. I do not think there is any obscurity, or ambiguity, in any clause of section 179 of the Code of 1876; and its manifest purpose is, to impose a liability on the principal and sureties in every official bond—1. “For any breach of the condition, during the time the officer continues in office, or discharges any of the duties thereof. 2. For the faithful discharge of any duties which may be required of such officer, by any law passed subsequently to the execution of such bond, although no such condition is expressed therein.” *It is not allowable to interpret what has no need of interpretation.* No other field of operation, for these clear

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statutory provisions, need be sought, than that which they so clearly express.

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Action for Money Paid, Money Had and Received, &c.

1. *When action lies for money paid by mistake.*—Money paid under a mistake of a material fact may be recovered in an action on the common counts in assumpsit, although the person making the payment had in his power the means of ascertaining the facts, and was guilty of negligence in not ascertaining them; but such negligence on his part is a fact for the consideration of the jury, in determining whether his alleged ignorance was real or feigned.

2. *Same, for money paid under forged instrument.*—A person who discounts a negotiable instrument which is forged, and to which he is not a party, may recover back the money so paid; but, when he is a party to the instrument, and stands in such a relation to the other parties that he ought to know whether it is genuine or not, he can not recover money paid on it.

3. *Same.*—The acceptor of a bill of exchange is chargeable with a knowledge of the drawer's signature, and can not recover money paid on a forged signature; but, if a material alteration is made in the draft, after it has been signed by the drawer, and the drawee is not guilty of any negligence in the matter, he may recover money paid on it in ignorance of the alteration; yet not against the drawer, unless negligence can be attributed to the latter.

4. *Action between innocent sufferers by wrongful act of third person.*—As between persons equally innocent, one of whom is bound to know and act upon his knowledge, while the other has no means of knowledge, the latter will not be burdened with a loss, in exoneration of the former; and when one of two innocent persons must suffer by the tortious act of a third, he must bear the consequences who gave the wrongdoer the means of doing the wrongful act.

5. *Same; letter of credit; money paid on forged bill of lading.*—A letter authorizing the person to whom it is addressed to draw on the writers for any cotton he may buy in a named city, provided the draft is accompanied by a bill of lading of the cotton, and does not in amount exceed three-fourths of the market price of the cotton, binds the writers, as in favor of any person who, on the faith of the letter, advances the money to buy the cotton, for a draft which conforms to the prescribed conditions, although the accompanying bill of lading is not genuine; and having paid the draft, they can not recover back the money, on discovering the fraud in the bill of lading.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Lehman, Durr & Co., of Montgomery, against E. B. Young & Son, of Eufaula, to recover the sum of \$2,409.60, for money paid by plaintiffs, on the 1st December, 1875, under the following circumstances: The plaintiffs were and are cotton factors and general commission-merchants, doing business in the city of Montgomery; and the defendants were and are brokers, doing business in Eufaula. Some time in November, 1875, a stranger came

*This case was decided at the December term, 1878.—REP.

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to Montgomery, giving his name as Albert Johnston, and representing himself as a man of considerable means, who desired to invest his money in lands in the vicinity of Montgomery. He was introduced to Lehman, Durr & Co., and deposited \$2,000 with them; saying that he intended to visit Eufaula before purchasing any lands, and that he might "buy some cotton on his travels in order to pay his travelling expenses." On the 23d November, 1875, plaintiffs paid him \$1,000, on his cheque, for that amount; and on the 25th he drew another cheque on them for \$1,000, from Eufaula, which was presented to them the next day and paid, they being advised by letter from him that he had drawn on them for the amount. On the 24th November, Johnston wrote to plaintiffs, from Morris, Georgia, as follows: "The prospect is, that I shall pick up some cotton. Will you send me a letter, so that I can go either to Eufaula or Cuthbert, to draw money? I have gotten in with a merchant here. Please allow me to draw as much as possible, as my means is small until I can get on more money. I have to-day bought nine bales here." In reply to this letter, plaintiffs wrote to said Johnston, under date "Montgomery, Nov. 25th, 1875," as follows:

"*Albert Johnston*, Morris, Ga. Dear Sir: Your favor of the 24th inst. just received, and note contents. For any shipments of cotton you may make to us, we will allow you to draw for three-fourths ($\frac{3}{4}$) value of shipment, with bill of lading attached to draft; and your drafts to this extent will be honored on presentation. By showing this to any banker in Eufaula or Cuthbert, they will cash your drafts on us, with B. L. attached. We would advise you to be very careful in making purchases. See that cotton is properly weighed; that it is dry, not mixed, sandy, or seedy, as these defects would cause cotton to be rejected, and might cause you some loss. Our market is quiet. Low Middlings, 12."

Signed,

"LEHMAN, DURR & Co."

On the 27th November, Johnston shipped to plaintiffs, from Midway, Alabama, five bales of cotton; advising them of the shipment by letter, and asking them to remit the proceeds of sale to him at Eufaula. In reply, on the 30th November, they acknowledged the receipt of his letter, "with R. R. receipt 5 B. C.," and remitted to him \$225, as an advance on the five bales; but Johnston failed to get the money from the Express office, and it was sent back to plaintiffs. On the 30th November, Johnson drew his cheque for \$2,409.60, payable on demand, to the order of E. B. Young & Son, on said Lehman, Durr, & Co., at Montgomery; and at-

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tached to said draft were two bills of lading, signed by the Central Railroad and Banking Company, one being for thirty-four bales of cotton, and the other for twenty-one; and said E. B. Young & Son advanced to him the amount of the draft, less one half of one per cent. "The said bills of lading were forgeries, in this: one of them was issued originally for one bale, and fraudulently raised to twenty-one; and the other was originally issued for four bales, and fraudulently raised to thirty-four bales. All this was done by said Johnston, before said bills of lading, attached to said draft, were presented to said defendants. The body of said bills, where written, had been originally filled up by Johnston, by consent of the railroad agent at Morris, Georgia; the agent signed them so filled up, and Johnston afterwards fraudulently raised them, as before stated. When said Johnston presented said draft, with said bills of lading attached, to defendants, he at the same time exhibited to them the said letter from plaintiffs, above set out, dated the 25th November, as his authority for drawing on plaintiffs; and defendants thereupon cashed said draft, paying for it its face value less one-half of one per cent. Johnston was a stranger to said defendants, and they had never had any other transaction with him; and they cashed said draft solely on account of said letter of credit from plaintiffs, which he then and there exhibited to them, knowing plaintiffs, but knowing nothing of said Johnston. Defendants immediately forwarded said draft, with their indorsement thereon, and with said bills of lading attached, to the cashier of the First National Bank of Montgomery, their correspondent, for collection; and said draft, with said bills of lading attached, were presented by said cashier to plaintiffs, on the 1st December, 1875; and plaintiffs immediately paid the same, and the money was at once remitted by said cashier to defendants as directed."

On the 30th November, the same day on which Johnston drew his said draft on plaintiffs, he wrote to them, as follows: "I did not get any money by express this morning. Please send the money you may have, by express, to this firm" [defendants'], "and oblige. I drew on you this day for sixty bales of cotton. I only drew eight (8) cents on a pound. Hoping all this is satisfactory," &c. "This letter was received by plaintiffs, before they paid the draft therein mentioned, and before the same was presented for payment. When they paid said draft, and received the same with bills of lading attached, plaintiffs had not received any of the cotton mentioned in said bills of lading, nor had they or their agents seen any part of said cotton. They made that payment under the honest belief that said bills of lading and

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draft were genuine and honest in every respect, and that there was no forgery or wrong about them; and when defendants cashed said draft, they likewise had no notice, knowledge, or information that there was anything wrong about said bills of lading, and acted in good faith in cashing said draft, upon the letter shown to them by Johnston." The five bales of cotton shipped from Morris, Georgia, for which the bills of lading were in fact given, were received by plaintiffs, and sold by them; but the fraud in the bills of lading being discovered in three or four days, they bought these bales back again, and tendered them to the defendants, with the draft and the forged bills of lading, and demanded the repayment of the money; which demand being refused, they brought this action to recover it.

On these facts, the court charged the jury, that, if they believed the evidence, they must find for the plaintiffs, for the amount paid by them on the draft, less the proceeds of sale of the five bales of cotton; and refused to charge, as requested by the defendants, that they should find for the defendants if they believed the evidence. The charge given, and the refusal of the charge asked, are now assigned as error.

S. H. DENT, for the appellants.

RICE, JONES & WILEY, *contra*. (No briefs on file.).

BRICKELL, C. J.—The general rule of law is clear and undisputed, that money paid under a mistake, on the part of the payor, of *a material fact*, may be recovered of the person receiving it, in an action of assumpsit, on either of the common counts, *for money had and received, or for money lent, or for money paid*. The authorities in this court do not excuse the person receiving from liability, because the payor, before making payment, had in his power the means of ascertaining the facts, and was not diligent in the employment of such means. That he had the means of informing himself, and imputes to himself negligence in not employing them, are circumstances for the consideration of the jury, in determining whether the professed ignorance is real or feigned. But, borrowing the language of Chitty on Contracts, "there is no conclusive rule of law, that because a party has the means of knowledge, he has the knowledge itself."—2 Chitty on Contracts, 930; *Wilson v. Sergeant*, 12 Ala. 778; *Rutherford v. McIver*, 21 Ala. 750.

An instance of the application of this general principle is, that if one who is not a party to a negotiable instrument

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discounts it, and the instrument is forged, he has parted with his money by mistake, and may recover it back from the recipient of it; "for, in such case, there is a failure of the consideration."—2 Chitty on Contracts, 931; 2 Dan. Neg. Ins. §§ 1369–70. Another instance, in which an action for money had and received may be supported, is when a note or bill is paid by one innocent, to a holder equally innocent, in spurious or counterfeit bank-bills.—*U. S. Bank v. Bank of Georgia*, 10 Wheat. 333. But an acceptor of a bill, to which the signature of the drawer is *forged*, is bound nevertheless to pay it to an innocent holder; for the presumption is, that he knows the handwriting of his customer, and the acceptance giving authority and currency to the bill, he can not subsequently dispute the signature.—2 Pars. Notes & Bills, 590. Having paid the draft or bill, though under an innocent mistake as to the genuineness of the signature of the drawer, he can not recall the payment, and recover the money from the *bona fide* holder to whom the payment was made.—*Price v. Neal*, 3 Burr. 1355; *National Park Bank v. Ninth National Bank*, 46 N. Y. 77. So, a bank, receiving from a *bona fide* holder its own notes as cash, though they may prove to be spurious, has no recourse against the holder from whom they are received. The receipt of the notes is deemed an adoption of them. It has the means of knowing if they are genuine; and if these means are not employed, it is certainly evidence of a neglect of that duty, which the public have a right to require. And in respect to persons equally innocent, where one is bound to know, and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burdening the latter with any loss in exoneration of the former.—*U. S. Bank v. Bank of Georgia*, *supra*.

These general principles the appellees do not controvert; but it is insisted, they are not of application to the facts of the present case, which involve no dispute of the signature of Johnston, the drawer of the draft, but of the genuineness of the bills of lading attached to the draft; and, therefore, the case falls within the principle which prevails when there is an alteration of the body of a bill or draft the drawee ignorantly pays. Knowledge of the writing composing the body, or a part of it, of a bill or draft, is not imputed to the drawee. It is not necessarily, and often is not, the writing of the drawer; and it is not presumable the drawee is more capable than the holder, of detecting any alteration which may be made in it. Hence, if the drawee is not guilty of negligence, he can recover money he may pay on a bill or draft altered in the body after signature by the drawer.—Morse on Banks, 300–1, and authorities cited in notes; *Bank of Commerce v.*

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Union Bank, 3 Coms. 230. There is a manifest difference, however, between such a case and the present. The drawer could not be made liable to the drawee, on the altered draft or bill, unless his own negligence contributed to mislead the drawee; as in the case of *Young v. Grote*, 4 Bing. 253, where the drawer left blank checks, signed by himself, in the hands of his wife, to be used during his absence, as the exigency of his business required; she carelessly filled up one, so that it was easily altered for a much larger sum than she inserted, and the alteration was not discoverable by the use of ordinary diligence; in its altered state, it was paid by the drawee innocently, and it was held the drawer must bear the loss. It is, in the present case, the fraud of the drawer, which must involve one of the parties in loss, and of his liability to the appellees there can be no doubt.

The fact is patent, that the letter of credit, given to Johnston by the appellees, was an invitation to the appellants, or to any bank or banker in Cuthbert, Georgia, or in Eufaula, to discount his drafts drawn on the appellees, if bills of lading of cotton consigned to them were attached, and the amount of the drafts did not exceed three-fourths the market price of the cotton. It would be so read and construed in the commercial world, and it was doubtless so intended by the appellees when it was written. The letter induced the appellants into the discount of the draft. The law simply utters the suggestion of common justice, and common sense, in declaring "that when one of two innocent persons must suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must bear the consequences of the act."—*Bank of Kentucky v. Schuylkill Bank*, Pars. Select Eq. Cases, 248.

The argument for the appellees is, however, that the parties are not equally innocent—that the letter of credit cast on the appellants the duty of ascertaining, before discounting the draft, and presenting it for payment, whether the bills of lading were genuine; and not having observed this duty, the loss is a consequence of their negligence, and they must bear it. The argument is not supported by authority, nor is there any sound reason, or principle, on which it can rest. The authority of Johnston to draw on the appellees was not general and unlimited. The limitation was, that the draft should be accompanied by bills of lading of cotton consigned to the appellees, and should not in amount exceed three-fourths the market price of the cotton. If he had drawn a draft, not accompanied by a bill of lading, or for an amount so much in excess of three-fourths of the value of the cotton shipped that the violation of the terms of the letter

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would have been apparent if ordinary prudence was exercised, the appellees could not have been made liable. The authority conferred by them would not have been exercised, and no party could have taken the bill in reliance upon it. But, when bills of lading are attached to the bill, and it does not in amount exceed three-fourths the market price of the cotton these bills purport to represent, it would embarrass the transaction of business, if the banker requested to discount the bill was bound to inquire whether the bills of lading were genuine. If the duty is imposed on the banker first discounting, it would rest equally on each subsequent holder, who sought to charge the appellees. Thereby, the negotiability of the bill would be seriously impaired, if not destroyed. The bill of lading is the security the appellees required Johnston to furnish them, for their protection against loss from their payment of his drafts. If it is not genuine, all that can be said is, there is a failure of the security for which they stipulated with him. The bank or banker, discounting the draft, was bound only to see that there was a bill of lading, importing a consignment of cotton to the appellees by Johnston, accompanying the draft, and that in amount the draft did not exceed the specified proportion of the value of the cotton. It was not the intention of the appellees, so far as their intention can be collected from the letter, that the bank or banker discounting on its faith the draft of Johnston, should inquire whether Johnston was dealing fairly with them—furnishing them adequate security for their acceptance or payment of the draft. Devolving such a duty on the bank or banker, by the embarrassments which would necessarily follow, would so seriously impair the negotiability of the draft, that the very purposes of the letter of credit would be defeated. All the bank or banker was bound to do, was to see that bills of lading, professing on their face, in the ordinary form, to represent a consignment of cotton to the appellees, accompanied the draft, and that the draft was not in excess of the proper amount. The assurance of the letter of credit was, that such a draft would be paid by the appellees on presentment.

In *Woods v. Thiedeman*, 1 Hurl. & Colt. 478, involving this question, it was said by POLLOCK, C. B.: "The only argument for the defendant is, that the words 'bill of lading,' import a genuine bill. I am of opinion, they mean such a document as Horneyer" (the drawer of the bills) "might send, or which was in the course of coming, professing to represent a cargo of wheat;" and such, he said, "is the meaning of the contract—not that the plaintiffs were to take upon themselves the risk of the bill of lading being a genuine instrument."

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In *Ulster Bank v. Synott*, 5 Irish Eq. 595, the question was very fully discussed, and thoroughly considered by the vice-chancellor, under a state of facts closely resembling that found in this record. The same conclusion was reached, as in *Woods v. Thiedeman*, that it was not the duty of the party discounting the bill to inquire into the genuineness of the bill of lading. It was the appellees, who had entered into business relations and dealings with Johnston, conferring upon him authority to draw on them, and assuring banks or bankers, at two named places, where he represented that he expected to buy cotton, that if bills of lading were attached to, or accompanied his drafts, they would be paid on presentation. They, and not the banks or bankers who acted on the letter of credit, are the sponsors of Johnston's honesty. Whatever of ability he had to injure others, proceeded from the letter of credit; and if their confidence has been abused, they furnished the means of the wrong, and must bear its consequences.

The drawee of a bill of exchange, who accepts it, can not resist its payment, as against a *bona fide* holder, because the acceptance is without consideration, or the consideration has failed.—1 Pars. Notes & Bills, 179. Nor, having paid it, though in ignorance of the want or failure of consideration, can he reclaim the money.—*Robinson v. Reynolds*, 2 Adol. & El., N. S. 196 (42 Eng. C. L. 638–641); *First National Bank v. Burkham*, 32 Mich. 328. In the latter case, the mistake of the drawees when they paid the bill, as in this case, was as to the genuineness of a security accompanying the bill; it was fictitious, when they supposed it to be genuine and reliable. COOLEY, J. said: "Admitting this to be so, how does the fact concern the payees? Do they assume to guarantee the fairness of the dealings of the drawers with the drawees, or the adequacy of any securities upon which the dealings are based? Not, certainly, in ordinary cases. The law merchant gives the payees the right to assume that any draft they receive and forward, if it is accepted and paid, is a draft which, from the state of the dealings between drawers and drawees, it is right and proper that the latter should pay as the principal party; and the presumption of law, that such is the case, is their complete protection, if they received the bill in the ordinary course of business, and for value.

It is doubtless true, the appellees relied on the bills of lading, as a security protecting them in the payment of the draft. There was no representation or warranty of their genuineness by the appellants. The only representation which can be attributed to them is, that the bills were received from Johnston, in the condition in which they accompanied the

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draft. There was no other representation, as there was none of Johnston's integrity or solvency. A mistake of either by the appellees, when they paid the draft, would be a mistake of fact, as well as their mistake of the genuineness of the bills of lading. To transfer responsibility for either mistake, from the appellees, to the appellant, is to reverse the rules of the commercial law, and to exonerate from liability the party enabling a stranger to commit a wrong, casting it on him who innocently trusted, where such party invited trust and confidence.

The Circuit Court erred in the charge given, and the refusal to charge as requested.

Reversed and remanded.

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Action against Bank, for Money Deposited and Collected.

1. *Deposition taken de bene esse; when suppressed, or not.*—When the deposition of a witness is taken, on the statutory ground that the defense, or a material part thereof, depends exclusively on his testimony (Code, §§ 3069, 3078), the deposition may be read in evidence on the trial, although the plaintiff makes the necessary affidavit requiring his personal attendance, if it is affirmatively shown to the court that the witness is incapable, both physically and mentally, of attending and testifying in person.

2. *Declarations of agent; admissibility against principal.*—In an action against an incorporated bank, the declarations or admissions of its president can not be received to establish a liability against it.

3. *Liability of bank for moneys deposited and collected during late war.*—A customer of an incorporated bank, who deposited with it for collection, at different times, between November, 1861, and April, 1862, notes and drafts on third persons; giving no instructions as to the kind of funds to be received, and making no demand until after the close of the war,—can not recover, under the common counts, more than the value of Confederate currency when the demand was made.

4. *Error without injury in rulings against plaintiff.*—When the plaintiff has recovered a verdict and judgment for a greater amount than, on the undisputed facts in evidence, he was entitled to recover, this court will not, at his instance, inquire into the correctness of any of the rulings of the court adverse to him.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. LOUIS WYETH.

This action was brought by the partners composing the late firm of A. G. Henry & Co., a mercantile partnership doing business at Guntersville, in Marshall county, against the Northern Bank of Alabama, a corporation chartered under

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the laws of this State prior to 1860, and located at Huntsville, in Madison county; and was commenced on the 10th April, 1868. The original complaint contained two counts; the first claiming \$6,154.25, alleged to be due on account stated between plaintiff and defendant, on the 4th April, 1862; and the second claiming the same amount, "due by account for money deposited by plaintiff with defendant, to be repaid on demand," and alleging a failure to pay on demand made on the 10th December, 1867. An amended complaint was afterwards filed, by leave of the court, claiming the same sum as "due by account on the 10th December, 1867, for money had and received by the defendant, for the use of the plaintiff;" and also "by account due on the 4th April, 1862, for money had and received," &c. The defendant pleaded, to the original complaint, "the general issue, with leave to give in evidence any matter that would be good in bar of the plaintiffs' action;" and to the amended complaint, the statutes of limitation of three and six years, and the general issue. Afterwards, several additional pleas were filed, "in short by consent:" 1st, tender of \$120 in gold before the commencement of the suit; 2d, that "no demand was made before suit brought, of any debt or duty by defendant owing or due to plaintiffs;" 3d, tender of \$120 in gold, and \$6,154.25 "in the notes of the State banks of Alabama, Tennessee, South Carolina, and Georgia, which were current when the deposits were made," with an offer to bring the money into court.

On the trial, as the bill of exceptions shows, "and before the jury was impaneled," the plaintiffs moved the court to suppress the deposition of James I. Donegan, the former president of the Northern Bank of Alabama, which had been taken on behalf of the defendant; and they reserved an exception to the overruling and refusal of their motion, under the facts stated in the opinion of the court. The plaintiffs offered in evidence, in support of their action, a copy of the "pass-book" which they had received from the defendant (the original having been lost), showing the state of accounts between them, and also the defendant's "ledger," which contained the same entries, and corresponded in every particular with the "pass-book." These entries were as follows: "Nov. 18, 1861, deposited in gold, \$120;" "Nov 19, deposit, C., \$350;" "Nov. 20, by deposit, C., \$45;" "Nov. 25, deposit, \$2,600;" "Jan. 13, 1862, deposit, C., \$1200;" "Jan. 18, deposit, C., \$2,255.22;" "Mar. 27, deposit, \$360.65;" "Nov. 20, 1861, to check, \$45;" "Jan. 21, 1862, to check, \$731.62;" "Balance, Jan. 1, 1863, \$6,154.25." In the "pass-book," however, this balance was struck as of the 4th April,

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1862; and it was proved by the teller and book-keeper of the bank, who were examined as witnesses, that the letter C., as used in these entries, meant Confederate currency. The plaintiffs proved, also, that on or about the 10th December, 1867, one of their attorneys presented said "pass-book" to the defendant's cashier, Th. Lacy, and demanded payment of the balance shown to be due to them; "that said Lacy, for the bank, refused to pay any portion thereof, but assigned no reason for said refusal; nor did he deny the liability of the bank, or the correctness of the amount; nor did he make any tender, in whole or in part, of any sum, or any kind of money; and there was no other proof on the point of demand and refusal, or of what occurred between said Lacy and said" attorney. Said attorney further testified, in this connection, "that he would have accepted from said Lacy only 'green-backs,' or national-bank currency." The plaintiffs read in evidence, also, several letters which they had received from the defendant's cashier, showing that the \$2,600 deposited on the 25th November, 1861, was collected on the plaintiffs' draft on Ewing, McCrarey & Co., of Nashville; and that the \$1,200, entered as a credit under the date of January 13, 1862, was paid in to the plaintiffs' credit, by H. L. Miller, "in current bank-notes."

"It was in proof, also, that the defendant suspended specie payments on the 18th September, 1861, and never resumed, and was the last bank to suspend in the Confederate States; that after the suspension of specie payments, and before any of these deposits were made, the officers of the bank were instructed not to receive any deposits of State Bank currency, or of Confederate treasury-notes, unless the depositors would consent to accept payment in like kind, or in Confederate notes, whichever the bank had on hand at the time. But it was in proof that the minute-entries of the bank contained no such order; and it was not proved by any one that Henry had any such notice of any such directions to the officers of the bank, except what is contained in the deposition of Donegan; and Henry himself testified, that no such notice had ever been given him. The said A. G. Henry proved, that the deposit of \$350 on the 19th November, 1861, was in State currency; that the deposit of \$45 on the 20th November, 1861, was in State Bank currency; that the deposit of \$1,200 on the 15th January, 1862, was in State Bank currency; that the item of \$2,600, of date November 25, 1861, was a collection made for him by the defendant, on his check on Ewing, McCrarey & Co., of Nashville, Tennessee; that the item of \$2,255.22, was a collection made for him by the defendant, on a certificate of deposit on a bank in Memphis, Tennessee;

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and that the item of \$360.65, of date March 27, 1862, was a deposit placed to his credit by Robert Fearn, but in what kind of currency he did not know. Cruse, the teller of the bank, proved that it was in Confederate treasury-notes. Said A. G. Henry further stated, that when he drew said order on Ewing, McCrary & Co. for \$2,600, and when he delivered the same to the defendant for collection, and when he remitted from Memphis said certificate of deposit for \$2,255.22, on the Memphis Bank, he gave the defendant no directions as to the kind of money in which said certificate and cheque should be collected, but he supposed, if he thought anything about it at all, that it would be collected in currency. Said witness stated, also, that when he made his said deposits with said bank, and when he drew said cheque on Ewing, McCrary & Co., and when he remitted said certificate of deposit on the bank at Memphis, for collection, he had no notice from any officer of the bank that said deposits would be received; and said collections made, only upon the condition that he would receive from said bank payment therefor in paper of the kind collected; that no such notice was given to him by any one; that said deposits were received, and said collections made, without any notice to him that the bank assumed therefor only a qualified liability, which it could discharge in currency of the kind it received from him; and that at the time of these transactions, and for a long time prior thereto, and now, he resided at Guntersville, in Marshall county. He stated, also, that when said deposits and collections were made, he knew that all Southern banks had suspended.

"It was in proof, also, that the defendant, after the suspension of specie payments, received the notes of the suspended banks of the Southern States, and Confederate treasury-notes, as bankable, and paid them out in the ordinary transactions of the bank; that it closed its doors, and removed its assets to Augusta, Georgia, on the 27th August, 1863, and did not thereafter resume business, or have any meeting of its board of directors, until the 8th July, 1865; that in the latter part of June, or the first of July, 1863, it gave notice by posters, stuck up at several places in Huntsville, to its depositors, to come forward and withdraw their deposits; but there was no proof that any such notice was sent to the plaintiffs, and they proved that they never received any such notice, nor had they any knowledge of the existence of such notice until this trial. It was in proof that, in June and July, 1863, there was no mail communication between Huntsville and Guntersville. The defendant's books, which were given in evidence, showed that between the suspension of specie pay-

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ments, on the 18th September, 1861, and the 3d June, 1863, the defendant discounted bills and notes to the amount of \$542,966.49; and between the 18th November, 1861, and the 27th March, 1862, the dates of plaintiffs' first and last deposit respectively, the defendant discounted notes and bills to the amount of \$360,760.57; but a large proportion of what were called discounted bills and notes, on the books of the bank, were simply renewals of antecedent debts. It was proved that, on the 27th August, 1863, when the defendant transferred its assets to Augusta, Georgia, they consisted of the following items: specie, \$37,130.06; State Bank notes on Georgia, Tennessee, Alabama, South Carolina, &c., \$25,000; bonds of the State of Alabama, \$307,500; Confederate States 8 per cent. bonds, \$20,900; Confederate interest-bearing treasury-notes, \$90,800; Confederate treasury-notes, \$9,200.

"It was in proof, also, that interest-bearing treasury-notes were not issued until the Fall of 1862; that at Huntsville, in November, 1861, State Bank currency and Confederate treasury-notes were from ten to fifteen per cent. below gold, and from forty to fifty per cent. below gold in March, 1862; that the defendant declared a semi-annual dividend of four per cent. on its capital stock (\$500,000) on the 4th February, 1862, and another semi-annual dividend of four per cent. on the 4th February, 1863, both payable in Confederate treasury-notes; and that the books of the bank showed balances due to depositors, upon deposits made during the war, and which have not been demanded since the war, of \$7,405.28, of which sum \$13,426.85 were for dividends declared during the war in favor of persons owning stock in the bank. Some of the persons to whose credit these deposits stood, testified that they had not demanded them of the defendant since the war, because it was their understanding when they made said deposits that they were only to be paid in currency, of like kind to that deposited; but others, to whose credit such balances stood, stated that they had not demanded them since the war, because they had forgotten that such balances stood to their credit, but that they had no notice from the bank, when they made their deposits, that they were only to be paid in money of like kind with that deposited." The defendant offered in evidence also, in this connection, a list of the persons who made deposits with it after its suspension of specie payments, "and proved that none of these depositors had ever demanded payment since the war." The defendant took the depositions of several citizens and merchants who resided during the war in Nashville and Memphis, Tennessee, and whose testimony was to the effect that, during the war, Confederate treasury-notes and the notes of

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suspended banks constituted the only currency in circulation in those cities, and were paid out by the banks in satisfaction of all demands on them. The plaintiffs objected to this evidence, and reserved an exception to its admission.

James I. Donegan, whose deposition was read in evidence against the plaintiffs' objection, testified as follows: "I am the president of the Northern Bank of Alabama, and have been since its organization. The claim upon which the plaintiffs are suing in this action, originated as follows: Some time in November, 1861, Mr. A. G. Henry, one of the plaintiffs, was in the bank, and stated to me that he had some six or seven thousand dollars in the notes of various suspended banks, of which he wished to make a general deposit in the Northern Bank of Alabama. I replied, that so much Confederate money was appearing in circulation, it was likely to take the place of every other kind of money, and that the probability was there would be no other kind of money in circulation; and that the bank could not receive the deposit, unless he would agree to receive Confederate money for it. He then remarked, that he would not deposit it, but, if I would take and keep it for him, he would make a special deposit of it. I told him, in reply, that I would take it, and take the same care of it as of our own, though I considered it a great risk, as war was raging. I took it from him, and kept it, and returned it to him after the war. In the same conversation, in November, 1861, he remarked, that plaintiffs had balances due them at various points in Tennessee, which would be sufficient to pay off the balances they owed to others, and asked me to oblige him by collecting them, assuring me that he would check it out immediately. I told him I would do so, if possible, upon the terms on which alone I could receive deposits; which was, as I have stated above, that the depositor would agree to receive Confederate money: I would receive no general deposits, except with the understanding that they were payable in Confederate money. The account sued on, with the exception of one special deposit of \$120 in gold, consists of deposits received and collections made upon the special terms and agreement above stated, on which alone, at that time, the bank would receive general deposits, and make collections. The bank has always been ready, and still is, to pay the gold specially deposited."

"A. G. Henry testified, in rebuttal of the statements contained in Donegan's deposition, that he had no conversation with said Donegan in the Fall of 1861, with regard to any of the matters to which Donegan testified; that he had no agreement or understanding with said Donegan when he

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made said deposits, and gave said check on Ewing, McCrary & Co., and remitted from Memphis, where he received it, said certificate of deposit on the Bank of Memphis, that said deposits and collections would only be received and made on the condition that he was to be paid in currency of the like kind with that deposited and collected; that nothing whatever was said to him by Donegan, on that subject, at the time of said deposits and collections, but said transactions were simple deposits, without any qualification as to the bank's liability therefor; that the only conversation he ever had with Mr. Donegan, of the character mentioned in Donegan's deposition, was in the Fall of 1862, when he went to the bank for the purpose of depositing between \$5,000 and \$10,000 in State Bank notes; that he then had an interview with Mr. Donegan, in the bank, and told him what he wished to do, and Donegan thereupon told him that the bank would not take said notes on deposit, except with the understanding that he was to be paid in Confederate treasury-notes; that he refused to deposit said bank-notes on this condition, and made a special deposit of them with Mr. Donegan, which was not entered on the books of the bank; that said special deposit was returned to him after the war by Mr. Donegan; and that this was the only conversation he ever had with Mr. Donegan on that subject. Plaintiffs offered to prove, by said A. G. Henry, that after the war, and before the institution of this suit, he called on Mr. Donegan, the president of said Northern Bank of Alabama, for a settlement of the claim now sued on; that said Donegan, in that conversation, admitted the liability of the bank, and proposed to settle the claim in this way: to allow plaintiffs one half of said claim, provided they would take \$10,000 in the stock of the National Bank of Huntsville, giving his note for the difference between what was allowed him on said claim and \$10,000, payable at twelve months; that said proposition was declined by plaintiffs; and that said Donegan, when said proposition was made by him, said nothing about buying the peace of the bank on a disputed claim, nor was there any denial of the justice of the claim, and the bank's liability therefor. To this evidence the defendant objected, because it was illegal and irrelevant; which objection was sustained by the court, and the evidence excluded; and the plaintiffs excepted."

The court charged the jury in writing, among other things, as follows: "The plaintiffs can recover only on the evidence offered which sustains their cause of action, as presented in their complaint; and in this case, they must show by proof that the defendant is indebted to them upon 'an account

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stated,' or 'for money deposited,' or for 'money had and received by the defendant, for their use, on or prior to the 10th December, 1867,' or 'for money had and received by the defendant, for the use of the plaintiffs, on or before the 4th day of April, 1862;' and failing to make this proof, they can not recover. It is important that you should know what is meant, in law, by the word 'money,' and the term 'account stated.' Money is—1st, the minted coin issued or circulated under the laws of the United States; 2d, bank-notes, payable and redeemable in such coin; 3d, the paper commonly called 'green-backs,' and the notes issued under the laws of the United States, called 'national-bank notes.' In this definition I do not include the notes issued by the Confederate States during the late war, nor the notes of banks which had suspended specie payments, during such suspension. Such might be circulated as a medium of commercial transactions, but were not money. You will please remember this definition of money, and apply it to the several portions of this charge which may relate to that subject. It is true, indeed, that a creditor might, if he chose, receive Confederate notes, or the notes of suspended banks, in payment of his debt; but, if refused, the debtor could not, under the plea of tender, avail himself of an offer to pay such paper."

"To enable the plaintiffs to recover on a count on an account stated, they must prove, either an actual accounting together, or an admission by the defendant that a fixed and certain sum of money is due to the plaintiffs. If the transactions which are the cause, and, to a great extent, the subject-matter of this suit, had occurred in times of peace, there would be but little difficulty in stating the law applicable to every phase of the case. But, as they occurred in times of war, we must remember that fact in all that we may say or do, and give to the words and phrases then used the meaning which they then had; and in all that I may give you in charge, or refuse to give as asked by counsel, I shall be governed by these principles which I have just stated, having reference to the then condition of the country. It is conceded that the transactions on which this action is founded, with the exception of the demand, occurred on and after the 18th November, 1861, in this immediate section of the country, and during the continuance of the war between the Confederate States and the United States. 'We know, as matter of public history, that shortly after the war commenced, and before the first of November, 1861, gold or silver coin, or any currency convertible into it, ceased to be a circulating medium in this State.' 'In all business transactions, it ceased to be a representative of value.' The law, concurring

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with justice, requires that a judicial tribunal should look to these circumstances, in determining the legal effect of contracts, and the signification of the language or words the parties have employed. It would be injustice, if we conclusively imputed to the term 'dollars,' as found in the entries in the defendant's books made here during the war, the significance of dollars employed in contracts made when the constitution and laws of the United States were prevailing without obstruction. Independent of, and without regard to any verbal agreement, a court, called on to pronounce judgment on a contract made under such circumstances, must consider the historical facts, which may enable it to arrive at the intention of the parties, in ascertaining the legal effect of the transactions which constitute whatever of contract may have been made between them. If, during the war, and on and after the 18th November, 1861, the plaintiffs placed in the hands of the defendant, for collection, certain drafts on Nashville and Memphis, when the banks of those cities had suspended specie payments, and when the only circulation was the notes of suspended banks and the notes of the Confederate States; then the jury, in connection with such proof, may consider the principles I have just mentioned, in determining whether or not the plaintiffs, actually or impliedly, authorized or permitted the defendant to collect these drafts in the notes of the suspended banks, or in the notes of the Confederate States. If they did, they can hold the defendant responsible for nothing more on such collections.

"In reference to the first count in the complaint, the only count on 'an account stated,' if you believe from the evidence that the plaintiffs' agent took with him the plaintiffs' bank-book, and went to the defendant's banking-house, and demanded payment of the balance shown on that book to be due; and that the officer of the bank, of and from whom the demand was made, denied the liability of the bank, or its indebtedness to the amount claimed, and refused to pay it; this is not, of itself, sufficient evidence to sustain the count on 'an account stated,' except for the amount of money, if any, then conceded to be due. Nor is it sufficient, if supplemented by the additional proof that, in April, 1862, plaintiffs wrote to defendant for information in regard to their account, and received a bank-book, in which, in connection with each deposit therein mentioned, there was a word, or letter, indicating that the deposit was made in gold, or in currency, after the suspension of specie payments by the banks, and during the existence of the war between the Confederate States and the United States; because such statement in said bank-book, so qualified, did not contain an unqualified

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admission of an existing indebtedness, in any ascertained and fixed amount of money,' beyond the amount of gold, or other legal money mentioned in the book; but, for the amount mentioned as deposited in gold, or other legal money, it is evidence under this count. Nor is such a bank-book, so marked, such a statement of an account as, in and of itself, will sustain a count on an account stated, unless you believe, from all the evidence, that the bank, through its officer, and in this manner, did acknowledge an indebtedness in 'legal money' as above described. When money is deposited in a bank, the bank becomes the debtor of the depositor, to the extent of such deposit; but, when a deposit is made in something else, which is not money, then the bank is liable only for the thing or commodity deposited, or its value at the time the demand is made for it. If no proof is made of its value, then you can not attach any value to it."

The plaintiffs reserved several exceptions to different portions of this charge, and requested twelve separate charges, covering the points to which exceptions were thus reserved; which charges were refused by the court, and exceptions duly reserved to their refusal. The charge given, the refusal of the several charges asked, and the rulings of the court on the evidence, as above stated, are now assigned as error.

L. P. WALKER, for the appellants.

HUMES & GORDON, and D. P. LEWIS, *contra*.

MANNING, J.—The deposition of J. I. Donegan was taken in 1872, several years before the trial of this cause, for the defendant, upon the statutory ground that the defense, or a material part thereof, defended exclusively on the evidence of this witness.—Code of 1876, § 3069, cl. 5. At the time of the trial, in November, 1877, plaintiff made an affidavit, according to section 3079, that he believed the personal attendance of the witness on the trial of the cause was necessary, and that he resided in Madison county; in which county the court was held. Whereupon, the judge made an order, and a notice thereupon was issued and served, requiring of the witness his personal attendance, to testify orally before the court; and he not appearing, the plaintiff insisted that, under said section, his deposition "must be suppressed." But, it being proved by the family physician of said Donegan, and by his son, a member of his family, that his physical condition was such that his personal attendance at the trial would probably endanger his life, and that he was men-

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tally imbecile (all of which was undisputed), the motion to suppress the deposition was overruled, and the deposition read in evidence. Plaintiff objected and excepted to the testimony, and to the ruling of the court, and here insists that it erred.

The legislation on this subject must be considered as a whole. Its object was to enable either party to take and secure in writing the evidence of an important witness in a pending cause, to be used on the trial, subject to the right of the adverse party to require that he should attend and testify in person before the jury, if then able to do so. In this instance, it was shown that the witness was both physically and mentally incapable of attending, and testifying in person. The object of the law would, therefore, have been defeated by the suppression of his deposition, and there was no error in permitting it to be submitted to the jury.

2. Nor did the Circuit Court err, in refusing to permit the plaintiff, Henry, to testify that Donegan, the president of the Northern Bank of Alabama, at a time when he was interested in establishing a national bank under the acts of Congress, at Huntsville, in 1867, admitted the liability of the Northern Bank to the plaintiffs, and proposed "to allow plaintiff one-half of his claim, provided plaintiff would take \$10,000 of the stock of the National Bank of Huntsville, giving his note for the difference between what was to be allowed him on said claim and said \$10,000, payable at twelve months." Although Donegan "said nothing about buying the peace of the bank" on that occasion (the Northern Bank of Alabama), it was not within the scope of his authority to charge it with a debt, by his admission. The management of its affairs had been committed, by the charter, to a board of ten directors. Debts of the bank might result from its contracts, or arise out of transactions with it, but could not be created by the mere admissions of its president, any more than its rights could be released or annulled by his unauthorized directions.—*Spyker v. Spence*, 8 Ala. 333.

3. A more important question remains to be considered. Plaintiffs, residing at Guntersville, in Alabama, had dealings with defendant, the Northern Bank of Alabama, in November and December, 1861, and the early part of 1862, during the war between the Confederate States and the United States of America. The only circulating medium then in use—that by means of which all the business of the country was carried on—consisted, in part, of the notes of suspended Southern banks, not redeemed or redeemable in coin, and much more largely, almost entirely, of the treasury-notes issued to circulate as money, by the government of the Con-

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federate States. These treasury-notes were promises to pay the number of dollars specified in them, respectively, when a treaty of peace should be concluded between said Confederate States and the United States of America. A currency so precarious, kept in circulation by the imperious exigencies of a period of revolutionary turmoil, when a government newly set up, supported by large armies, and many millions of people, was struggling to maintain in these Southern States the authority it had seized from an older and stronger government, supported by larger armies, and more millions of people, who lived outside of the same territory, could not be otherwise than of uncertain and doubtful value. This fact was recognized by everybody. The paper in use as a currency not only had no intrinsic value, but its redemption ultimately was wholly problematical. But, being forced into universal use by the necessities of the times, it was contracted for, received, and paid out, as a substitute for money, because there was nothing else with which the functions of money in the transaction of business could be performed. As a consequence, the banks of the country were compelled to receive and pay out this currency, or close their doors, and cease to exist. If they had done the latter, the people would have been deprived of the useful agency of these institutions in collecting debts due from one to another, keeping their funds on deposit, and paying them out on demand upon cheques or orders.

It was to do these things for them, that plaintiffs availed themselves of the services of the Northern Bank of Alabama. They deposited in it notes, cheques, and other commercial paper, that it might collect and take care of the proceeds, and have the amount thereof forthcoming when and as demanded. They knew, also, that it could not make collections, in any other than Confederate currency; and this they authorized the bank to take for them, and engaged to take from it, under the extraordinary circumstances of the times, by not informing it that they would not do so. Mr. A. G. Henry, himself, testified that "when he drew said order on Ewing, McCrarey & Co., of \$2,600, and when he delivered the same to said bank for collection, and when he remitted from Memphis said certificate of deposit for \$2,255 22-100, on the Bank of Memphis, he gave the defendant no directions as to the kind of money" that should be required, and that "he supposed, if he thought anything about it at all, that it would be collected in currency." Outside of public knowledge on the subject, the testimony shows nothing else could be obtained.

This suit was brought April 10th, 1868. The complaint
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claims, in the first two counts, \$6,154.25, on an account stated; the first count alleging that the account was stated April 4th, 1862; and the second, that it was stated the 10th day of December, 1867; and by two other counts, subsequently added, the same sum is claimed to be due, for moneys had and received by defendant, for the use of plaintiffs, at those same dates respectively. There is no claim founded on a count setting forth the special facts of the case, or the particulars of any transaction. The evidence relied on by plaintiffs, to show such indebtedness, was the pass-book they received in April, 1862, of defendant, and its account with them on its books, corresponding with the entries on the pass-book: by both of which, and other evidence, it appears that, with the exception of the first item of \$120 in gold, all the others were of deposits with it, or payments made to it for plaintiffs, in Confederate currency. This was indicated also, and understood to be indicated, by the letter "C," written in the lines with those items, as a part of the same. No demand was made for any payment, until a considerable time after the war was ended in the overthrow of the Confederate government; and it is not proved, or pretended, that this currency then had any value.

The circuit judge charged the jury, that "money" consisted (1st) of the coin issued or circulated under the laws of the United States; (2d) of bank-notes payable and redeemable in such coin; and (3d) of the paper commonly called "green-backs", and the notes issued under the laws of the United States commonly called "national-bank notes." "In this definition," he added, "I do not include the notes issued by the Confederate States during the late war, nor the notes of banks that had suspended specie payments during such suspension. Such might be circulated, as a medium of commercial transactions, but were not money." And he, in effect, charged the jury that, unless defendant had admitted itself indebted in money, as thus described, or beyond the extent to which it had done so; or unless it had received money, or beyond the amount to which it had received money, as thus defined,—it was not liable to plaintiffs, according to the terms of the complaint they had filed in this cause. These instructions were excepted to, and counter charges, intended to obviate the effect of them, were offered, which the judge refused to give; to which, also, the plaintiffs excepted. A verdict for \$500, including the sum of \$120 in gold, was rendered in favor of plaintiffs; which they being dissatisfied with, appealed from, to this court.

3. The view we take of the case makes it unnecessary to discuss in detail the various propositions which have been pre-

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sented by counsel for appellants. They are answered, or obviated, by the conclusion we have reached, conforming to that of the Supreme Court of the United States in *Planters' Bank of Tennessee v. Union Bank of Louisiana*, 16 Wallace, 483. During the war, the former institution forwarded to the latter, among other things, drafts and claims for collection, and a few Confederate bonds for sale; it being understood between the two, that the drafts and claims thus forwarded were payable only in Confederate currency, and that the same might be received for the bonds to be sold. Some time afterwards, in the year 1863, while this currency still had value, a demand was made by the Planters' Bank, on the Union Bank, for payment of the large sum that should be on its books to the credit of the former. But, owing to the interference of General Banks, commander of the forces of the United States then in New Orleans, payment was refused; and a suit was, in consequence, brought after the war, in a court of the United States, by the Planters' Bank against the Union Bank. At the trial, the plaintiff bank asked, among other charges, that the following should be given to the jury: "If the jury should find, from the evidence, that the defendants received Confederate currency on behalf of the plaintiffs, and entered it to the credit of the plaintiffs, on the books of the bank, and used it in their general business, the defendants thereby became the debtors of the plaintiffs; and that the measure of the indebtedness was the value of the Confederate currency, in the lawful money of the United States, at the time the credits were entered and the collections made." This instruction the court refused to give, but it charged the jury, 'that the measure of indebtedness for receipts or collections made by the defendants in Confederate currency, and used by them in their general business, was the value of such currency at the date of demand of payment made by plaintiffs, and not at the date when such currency was received and used by the defendants in their business.'

The Supreme Court held, that this instruction was correct. "We do not," says the opinion, "controvert the position, that generally a bank becomes a debtor to its depositor, by its receipt of money deposited by him, and that money paid into a bank ceases to be the money of the depositor, and becomes the money of the bank, which it may use, returning an equivalent, when demanded, by paying a similar sum to that deposited. So, also, a collecting bank ordinarily becomes the owner of money collected by it for its correspondent, and, consequently, a debtor for the amount collected, under obligation to pay on demand, not the identical money received, but a sum equal in legal value. But, it is to be observed,

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this is the rule where money has been deposited or collected, and when there has been no contract or understanding that a different rule should prevail. . . . The Union Bank became the agent of plaintiff, to receive and collect, not money, but Confederate notes or promises; and the obligation it assumed was to pay Confederate notes, when they should be demanded. . . . From the nature of the transaction, it is to be inferred, that the intent of the parties was, that the one should impose, and the other assume, only a liability to return to the plaintiffs notes of the Confederate government like those received or collected; notes promising to pay a like sum."

There was no dissent from these views on the part of any of the judges. Having regard to the times and circumstances; remembering that the regular government was expelled, and kept expelled, by another of paramount force, by which "the Confederate notes were issued early in the war, . . . and became almost exclusively the currency of the insurgent States; . . . and, while the war lasted, had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people" (*Thorington v. Smyth*, 8 Wallace, 1); a contrary doctrine, one applicable enough in ordinary peaceful times, would be, in the highest degree, unreasonable and unjust. And so entirely do the views of the Supreme Court correspond with the general understanding of the people of these States, that, as is shown by the evidence in this cause, plaintiffs are the only persons of the numerous customers and creditors of the defendant bank, who became such in the same manner, and during the same period, and were such at the close of the war, that have insisted it should now make good losses of value produced by irresistible political causes operating upon the currency which only they were entitled to, and upon that of every other person alike.

4. It results from what we have said, and from the fact that, when demand was made by plaintiffs of defendant, Confederate currency had no pecuniary value whatever, that the judgment they obtained included all they were entitled to recover from the defendant. No benefit can accrue to them in this cause, by a decision of the other questions that have been presented, and we, therefore, refrain from discussing them. Let the judgment of the Circuit Court be affirmed.

BRICKELL, C. J., not sitting.

NOTE BY REPORTER.—On a subsequent day of the term, the following opinion was delivered:

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STONE, J.—The uses of banks and banking institutions, in the commerce of the world, are too well known to require discussion. They furnish, without compensation, and without direct profit, a safe and convenient depository of the moneys of the public, not wanted for present use or disbursement. Their safes and strong vaults, for the safe custody of valuables, are preferred to the most watchful supervision and protection the most prudent man can exercise or bestow. So well known has this fact become, that trustees may deposit trust funds in banks of good standing; and if they do so, any loss resulting therefrom will be regarded as the loss of the beneficiary, provided the deposit is made to the credit of the trust account.—Story's Eq. Ju. §§ 1269 *et seq.*

The war between the sections, commencing in 1861, produced, in many respects, a state of things rarely met with in the history of the world. The several States composing the Union had theretofore existed under one common, recognized head. To the extent of the powers conferred on the Federal government, we were one government. Our lawful money, and money standard, were one; and, as a rule, money current in one State, was current in all the others. Commercial dealings between the several States were very large, and remittances from one section to another were mainly conducted through banks. Coin had alone been declared a legal tender, and the expense and inconvenience of its transmission had forced it to give place to the less expensive, less hazardous method, of remitting in bank exchange. The war changed all this. The States which attempted to set up a separate government, under the name of the Confederate States of America, must necessarily provide a currency for themselves. A colossal war ensued, which raged for four years. All great wars are fought on credit; and the seceding States, having at the beginning no exchequer, must, of necessity, rely on its bills of credit, to procure the sinews of war. Treasury-notes of the Confederate States were issued in immense volume, and very soon became the sole circulating medium within the Southern lines. Being issued, as they were, on the faith of a government whose existence was denied and resisted, and could only be maintained by the termination of the struggle successfully to the arms of the South, the value of such treasury-notes was, of course, contingent. Still, being the only circulating medium we had, they served the purposes of money. They purchased and paid for property of every description, were received in payment and discharge of debts, and, while they had life, answered all the purposes of money. They even discharged trust obligations, when received in good faith; and, when that cur-

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rency perished in the hands of the trustee, for want of an opportunity to invest, or otherwise dispose of it, if there was no evidence of bad faith in the trustee, we have held that the debt is discharged, the trustee relieved of legal liability, and that the loss falls on the beneficiary.—*High v. Snedcor*, 57 Ala. 401; *Horn v. Lockhart*, 17 Wall. 570; *Waring v. Lewis*, 53 Ala. 615; *Baldwin v. Hatchett*, 56 Ala. 561; *Hutchinson v. Owen*, 59 Ala. 326; *Van Hoose v. Bush*, 54 Ala. 342.

During the war, banks, located in the Confederate States, were compelled to receive and pay out Confederate treasury-notes, or do no business whatever. The volume of such notes in circulation was very large—increased by the heavy depreciation they were constantly subjected to. Having so little purchasing power, it became necessary to make up in quantity what was wanting in value. A large per cent. of this immense volume of Confederate treasury-notes, amounting to hundreds of millions of dollars in nominal value, was passing in and out of the banks; and it is safe to conjecture that, at no time during the closing years of the war, was there less than hundreds of millions of this currency in the vaults of the various banks. At the close of the war, by the surrender of the Southern armies, the Confederate States, as a separate government, ceased to exist, and the immense volume of its circulation became valueless.

The rule is clearly settled, that in the ordinary transactions of banks, when they receive moneys on general deposit, the money thereby becomes the property of the bank, and the bank becomes debtor to the depositor for the amount, as so much money had and received; and any subsequent loss of the money, or destruction of its value, falls on the bank. The depositor is only a creditor; and if the bank fail, and be unable to pay its debts in full, he comes in only as a general creditor, and must be content to receive his *pro rata* of the assets. This, we say, is the general rule. But, as we have said, our war was attended with uncommon results. Its end in our overthrow left us where we were before the attempted separation; citizens, and part and parcel of the same government, against whose authority we had fought in deadly conflict. For four years we had denied the authority of the United States government to control us in any respect—had denied that we were under the provisions of the constitution of the United States; and the Confederate treasury-notes were issued, and put in circulation, to aid us in vindicating our claim of separate governmental existence. Being conquered, we were remitted to our allegiance to the government of the United States; and the question naturally came up, in what light must contracts and transactions be

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viewed, which were based on Confederate treasury-notes as a currency. They had been issued in hostility to the government of the United States, and must be passed on by courts of the United States, or State courts acknowledging allegiance to the constitution of the United States. It was contended that, inasmuch as this currency was issued to aid in the overthrow of Federal authority in the seceding States, it was against public policy to uphold any transaction based upon it. Wiser counsels prevailed, and the courts adopted conservative rules, which, while they vindicated the dignity and rightful authority of the Federal government, abstained from declaring void any contract or transaction which did not, in its direct aims and results, antagonize that authority. The issue of such currency, they held, was unlawful, because it was aimed against the Federal authority. Being in circulation, however, and the only circulating medium the people had, or could have, they were forced to its use by the presence and power of an organized force, having and exercising the powers and functions of government, and they were left without option in the premises.

Confederate treasury-notes must be used, or the people were left without money, or any thing to take its place. So, contracts between individuals, based on that currency, and having in them no element of aid to the Confederate struggle, whether executed or executory, were not held invalid on that account.—*Thorington v. Smyth*, 8 Wall. 1; *Horn v. Lockhart*, 17 Wall. 570. "The existence of a state of insurrection and war did not lessen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prevented, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in time of peace."

Ours was a peculiar form of government, and the struggle and attempted separation raised questions somewhat novel. We had, and have, a Federal government, supreme, sovereign, and paramount, in all powers and governmental functions conferred upon it. All other powers of government, and they were many, were reserved to the States respectively, or to the people. Each was sovereign, within its appointed sphere. The object of secession was to renounce and throw off the Federal power, and only the Federal power. The power, jurisdiction, and autonomy of the seceding States, were not attempted to be changed. These were to be exercised as theretofore, with the single exception that they sought to establish a confederated union among and within themselves, independent of the larger and more comprehen-

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sive union from which they attempted to secede. This being the case, it would seem that all legitimate acts of State authority and government, done in preservation of life, liberty and property, contributing to individual comfort and happiness, and relieving social wants and social necessities, should be upheld, so long as they rendered no aid to the attempt to establish a separate government; and such we understand to be the weight of the judicial rulings on this troublesome question.

But, in carrying out this principle, many vexing questions arose, and continue to arise. In theory, and in fact, we have all the while been under the power and restraint of the constitution of the United States. Such is the legal sequence of the result of the war. Contracts for the payment of money, expressed as so many dollars, were frequently entered into during the war, fixing a time of payment which fell due after the downfall of the Confederacy. Dollars have a defined value under the constitution and laws of the United States. Treating such contract as one for the payment of money, and treating the parties as governed by the constitution and laws of the United States, the promissor would be held to pay the given sum in current, legal money of the United States. But, when it was shown that the contracting parties were domiciled in the section controlled by Confederate authority, where only Confederate currency circulated, the presumption arose, at once, that the parties did not probably contract in reference to dollars of the United States currency; and that presumption was made conclusive, when it was shown that the price promised, if exacted in the lawful money of the United States, would be, perhaps, tenfold the actual value of the property purchased. Hence, courts were compelled to hold, what was in fact the case, that the contract was made in reference to Confederate currency, and that the price agreed on was a Confederate valuation. But, from any legal stand-point, courts, recognizing the authority of the United States government, could take, Confederate treasury-notes were not money; and if money, they were a greatly depreciated currency. They were, then, either a depreciated money, or they were not money, but a commodity or chattel. Considered as depreciated money, the promise was to pay so much depreciated, or uncurrent money. For a breach of such promise, the measure of recovery is the value, in lawful money, of the uncurrent money at the time of the breach. The measure of recovery is the same, on the breach of a contract to pay specific chattels.—*Moore v. Fleming*, 34 Ala. 491; 22 Ala. 512; *Boze-man v. Rose*, 40 Ala. 212; *McGehee v. Posey*, 42 Ala. 330. But,

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at the time of the breach, the currency or chattel (Confederate treasury-notes) had ceased to have any value, actual or conventional. Applying the rules above, there could be no recovery for the breach of such a contract. The courts established, as the measure of recovery in such case, the value of the property which was the consideration of the promise; thus ignoring the express stipulations of the contract, and treating it as an implied one.—*Herbert v. Easton*, 43 Ala. 547; *Riddle v. Hill*, 51 Ala. 224; *Erwin v. Hill*, *Ib.* 580; *Whitfield v. Riddle*, 52 Ala. 467; *Thorington v. Smyth*, 8 Wall. 1; *Stewart v. Solomon*, 4 Otto, 434; *Hill v. Erwin*, 60 Ala. 341. This ruling can not be reconciled with principles long established, but it was considered a necessity, to prevent gross injustice. Other rulings, growing out of the war, have been equally a departure from principle, but we will not enlarge this opinion by stating them. The cases of *Myers v. Zetelle* (21 Grat. 733), and *Ferguson v. Lowery* (54 Ala. 510), are strong and eloquent arguments in favor of generous, liberal rulings, in all cases where the results of our civil war, viewed *a posteriori*, have entailed a seeming liability on agents and trustees.

We have dwelt so much at length on these principles, not because they bear directly on the question before us, but because they demonstrate that well-settled principles of law, applicable to society in its normal conditions, must be departed from, when their enforcement would lead necessarily to a great and general evil. We have said that, at the downfall of the Confederacy, there had accumulated in the banks, in the natural course of dealings, perhaps hundreds of millions in Confederate currency, deposited and not drawn out. When the flag of the Confederacy went down, to be unfurled no more, that vast volume of a circulating medium became waste paper, representing nothing. A deposit in bank, while, as a general rule, it is attended with the incidents pointed out above, is nevertheless a peculiar species of contract. It is not like an ordinary 'bill receivable,' but is classed as the depositor's cash on hand. It is subject to his draft and control at any moment, and he is not expected to give notice of his intention to draw. The bank is expected to be at all times ready to meet its customers' cheques, drawn on deposits, and its credit is seriously impaired, if not ruined, if it fail to do so. It does not stand in the category of an ordinary debt between man and man, for money had and received. These considerations, if the question were for the first time presented, would cause us to hesitate long before declaring the bank liable for a deposit which thus perished on its hands. We are glad the way has been blazed

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out for us by that distinguished tribunal, the Supreme Court of the United States. We cheerfully follow the decision in *Planters' Bank of Tennessee v. Union Bank of Louisiana*, 16 Wall. 483, because, in our opinion, it leads to a wholesome and just result.

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Trover for Conversion of Municipal Bonds.

1. *Rights of property.*—The principle is almost universal in its application, that no man's property can be taken from him without his consent, express or implied, except by due course of law.

2. *Transfer of bills, notes, or bonds; rights of transferee.*—Negotiable or commercial paper is transferrable by delivery, and a holder thereof may, before dishonor, transfer to a *bona fide* purchaser for value a title freed from all infirmity, and which will prevail over that of the true owner, although he himself obtained it fraudulently, or feloniously; but, as to all other paper, an assignee or transferee succeeds only to the rights and title of his assignor or transferor.

3. *What paper is negotiable, or transferrable by delivery.*—A bill of exchange, promissory note, or other instrument, to be negotiable paper, or transferrable by delivery, must be payable absolutely and unconditionally, and not on a contingency which may never happen; and this must depend upon its terms at the time it is made: if, when it is made, the payment is to depend on a condition, contingency, or uncertain event, the subsequent happening of that event or contingency will not change its character.

4. *Same; bonds of corporation.*—The bonds of a corporation, public or private, if issued by authority, and possessing in themselves the requisites of negotiable paper, are, after some vacillation of judicial decision, now recognized as on an equality with bank-notes, bills of exchange, and promissory notes; and the corporate seal does not affect their negotiability, neither conferring nor destroying that quality.

5. *Requisites of negotiable paper.*—Negotiable paper must also be certain as to the payee: though it is not necessary that the payee should be named, the instrument must on its face afford an indication or designation by which he can be ascertained.

6. *Same.*—Each State has the undoubted legislative right and power to enlarge or diminish the character of paper which shall be negotiable; and under the laws of Alabama, passed in the exercise of this power, only bills of exchange and promissory notes payable in money at a bank or banking-house, or at a certain place therein designated, and bank-notes intended to circulate as money, are subject to the commercial law; while it is expressly declared by the statute (Code, § 2098), that all bonds, bills, or notes (except those issued to circulate as money), when "payable to anything or bearer, or to any fictitious person or bearer, or to bearer only, must be construed as payable to the person from whom the consideration moved," and, consequently, can only pass by his indorsement.

7. *Municipal bonds of Troy, issued in aid of Mobile and Girard Railroad.* The bonds issued by the city of Troy in aid of the Mobile and Girard Railroad, under the authority of the special statute approved December 8th, 1868 (Sess. Acts 1868, pp. 395-6), are not negotiable paper, because on their face they are made payable on a contingency which might never happen—that is, the completion of the railroad to Troy; and also because they are payable to

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bearer only. Not being negotiable, the title to such bonds can not pass by delivery, nor, as against the real owner, otherwise than by his indorsement or assignment.

8. *When trover lies for conversion of bond.*—The owner of a non-negotiable bond may maintain an action for its conversion against a person who obtained it through an unauthorized transfer by his agent or bailee, and who refuses to deliver it on demand.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

This action was brought by Homer Blackman, against Lehman, Durr & Co., to recover damages for the alleged conversion by the defendants of one hundred and eighty bonds, issued by the corporate authorities of the city of Troy, in aid of the Mobile and Girard Railroad. On the undisputed facts of the case, the court charged the jury, in effect, that the plaintiff was not entitled to recover; and this charge, to which an exception was duly reserved, is now assigned as error. The opinion states all the material facts. The case was decided at the December term, 1878.

D. CLOPTON, for appellant.

S. F. RICE, and W. A. GUNTER, *contra*.

BRICKELL, C. J.—The action is trover, for the conversion of one hundred and eighty bonds of the city of Troy, for the payment to bearer of the sum of one hundred dollars each, in ten annual installments, with interest at eight *per cent. per annum* from date, the 13th January, 1869. In December, 1869, eighty of these bonds were by the plaintiff deposited with his son-in-law, one M. B. Locke, who was a merchant, banker, and factor, residing and doing business at Union Springs, the place of plaintiff's residence. The remaining one hundred bonds had been deposited for plaintiff with the firm of Epping & Howard, of Columbus, Georgia, on the 27th of December, 1869; an order to them was given him, for their delivery, which he indorsed as follows: "*Please deliver to M. B. Locke, or order;*" signed "H. BLACKMAN." The eighty bonds were left with Locke for safe-keeping, and the order for the others indorsed to him that he might get them for the same purpose. Locke was directed to ascertain on what terms the plaintiff could raise money on the bonds, but was not authorized to dispose of them in any manner whatever. He was largely indebted to Lehman Brothers, of New York. The defendants, Lehman, Durr & Co., a firm in Montgomery, two of the members of which were members of the firm of Lehman Brothers, through one Mitchell, undertook the settlement of this indebtedness. The indebtedness of Locke amounted to about thirty thousand

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dollars. He conveyed to the defendants real estate, valued at twenty thousand dollars, and transferred by delivery the one hundred and eighty bonds of the city of Troy; and the defendants gave him their drafts on Lehman Brothers, for thirty thousand dollars, which he used in paying his indebtedness to them. These drafts were by the defendants credited to Lehman Brothers, and they charged the defendants with them. Locke gave the defendants a sale-bill of the bonds, but they were not indorsed by the plaintiff, or any one else. The defendants had no notice of the plaintiff's right or claim to the bonds, when they obtained them from Locke, which was on the 13th April, 1870. The value of the bonds, and a demand of them before the commencement of this suit, was proved. The instructions given by the City Court, in substance, deny that on this state of facts the plaintiff could recover.

These bonds were issued by the city of Troy, a municipal corporation created by the laws of this State, under the authority of an act of the General Assembly, approved December 8th, 1868, by which the city was authorized to subscribe a sum, not exceeding seventy-five thousand dollars, to the capital stock of the Mobile and Girard Railroad, and to issue bonds, bearing eight *per cent.* interest, in payment of such subscription. The act declares, "None of said bonds, or interest thereon, shall be due or payable, until said railroad is in running order, and the cars run to said Troy."—Pamph. Acts 1868, pp. 395-7. The bonds refer to this act, and in one part recite, "Payments to commence at the date of the completion of said railroad to Troy, Alabama"; and in another, that payments are to be made in "ten annual installments, together with the interest thereon that may have accrued thereon, on demand, after the completion of the Mobile and Girard Railroad, to the said town of Troy, Alabama; payments to be made at the office of the treasurer of the town of Troy, Alabama." On the 20th January, 1870, two acts of the General Assembly were approved; the one legalizing the subscription of the city to the railroad, and the bonds issued in payment of it; and the other providing for the payment of the bonds, by the real-estate owners of the city, *as the same shall fall due.*—Pamph. Acts 1869-70, pp. 39-42.

"It is a principle, almost universal in its application, that no man's property can be taken from him without his consent, express or implied, except by due process of law. The maintenance of the principle is essential to the peace and safety of society; and the insecurity which would follow from any departure from it would cause far greater injury, than any which can fall, in cases of unlawful appropriation

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of property, upon those who have been misled and defrauded."—*Telegraph Co. v. Davenport*, 97 U. S. 369.

In England, there is a deviation from the principle, in cases of sales made in *market overt*.—3 Black. 172; Benjamin on Sales, 7. This deviation is not recognized in this country; and the general maxim of our jurisprudence is, *Nemo in alium potest transferre plus juris quam ipse habet*.—Hilliard on Sales, 23; *Williams v. Merle*, 11 Wend. 80; *Leigh Brothers v. M. & O. R. R. Co.*, 58 Ala. 165.

An exception to this rule, firmly established, is that of negotiable or commercial paper, transferrable by delivery. The holder of bank-notes, bills of exchange, promissory notes, the ordinary coupon bonds of corporations, or of the State, or of the United States, passing by delivery, transferring them before dishonor, for value, to a *bona fide* purchaser, though he may have obtained them feloniously, or fraudulently, or though he may by the transfer exceed his authority, or violate trust and confidence reposed in him, can confer a title he has not, or greater than he had,—a title freed from all infirmity, and which will prevail over that of the true owner.—*Rumball v. Metropolitan Bank*, 20 Eng. (Moak's ed.) 276; *Murray v. Lardner*, 2 Wall. 110; *State of California v. Wells, Fargo & Co.*, 15 Cal. 336; *Spooner v. Holmes*, 102 Mass. 503; *Welch v. Sage*, 47 N. Y. 143; *Seybel v. National Bank*, 54 N. Y. 288. The exception is founded on the commercial policy of sustaining the credit and circulation of negotiable paper.—3 Kent, 79. It applies only to paper of that character. As to all other paper, an assignee, or transferee, succeeds to, and is clothed with, the rights only of the transferrer or assignor.

A bill, or note, or other instrument, cannot fall within the operation of this exception, nor is the transferee thereof entitled to protection against the right or title of the true owner, unless it is payable absolutely and unconditionally. The rule is thus stated in Chitty on Bills: "The money must be payable at all events—not dependent on any contingency, either in regard to event, or with regard to the fund out of which payment is to be made."—Chitty on Bills, 134, marg. The rule applies to all kinds of commercial paper. In reference to a promissory note, it is stated, "to make a written note for the payment of money a valid promissory note, the money must be payable absolutely, and at all events, and not be subject to any condition or contingency."—Story on Prom. Notes, § 22.

Whether an instrument is commercial—is of the character entitling it to the peculiar protection afforded by the law to paper of that kind—must appear on its face, or a contem

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poraneous memorandum on the same paper. Its character depends upon its terms at the time it is made; and if it then purports a payment to be made upon a contingency, or a condition, or uncertain event, the subsequent happening of the event or contingency will not change it.—Story on Prom. Notes, §§ 22-24. The reason of the rule, it was well said by Lord KENYON, in *Carlos v. Fancourt*, 5 Term, 483, is, “that it would perplex the commercial transactions of mankind, if paper securities of this kind were issued out into the world incumbered with conditions and contingencies, and if the parties to whom they were offered in negotiation were obliged to inquire when the uncertain events would probably be reduced to a certainty.” And in the same case, ASHURST, J., said: “Certainty is a great object in commercial instruments; and unless they carry their own validity on the face of them, they are not negotiable. On that ground, bills of exchange which are payable only on a contingency are not negotiable, because it does not appear on the face of them whether or not they will ever be paid. The same rule, then, that governs bills of exchange in this respect, must also govern promissory notes.”

In *Cota v. Buck*, 7 Metc. 588, it is said by C. J. SHAW, that “the true test of the negotiability of a note seems to be, whether the undertaking of the promisor is to pay the amount at all events, at some time which must certainly come, and not out of a particular fund, or upon a contingent event. If it were payable on a contingency, or out of a particular fund, it would not be negotiable.” A note, promising to pay a certain sum of money for staves, at two dollars a thousand, subject to a deduction for any number not procured, is not a promissory note.—*Martin v. Woodall*, 1 St. & Port. 244. A note payable to bearer, six months after date, for a certain sum, *provided the ship may arrive at an European port of discharge, free from capture and condemnation by the British*, is not a promissory note.—*Coolidge v. Ruggles*, 15 Mass. 387. An order for the payment of fifteen hundred dollars, “*at sight, after the arrival and discharge of coal by brig G, to the order of myself,*” is not a bill of exchange. *Grant v. Wood*, 12 Gray, 220.

The principle on which these, and numerous decisions rest, is, that no instrument is commercial—is a bill of exchange, or a promissory note—unless it is payable at all events. If payment depends on a contingency, which may never happen, it is not commercial. But, if the event must certainly happen, the uncertainty of time when it will happen will not render the instrument a mere special agreement or contract. The time of payment may be in suspense, and

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may so continue, indefinitely; but, if it will inevitably happen, and the instrument has the other requisites, it will be regarded as a promissory note or bill of exchange.—*Lockett v. Palmer*, 25 Barb. 179.

The bonds of a municipal corporation, or of a private corporation, having authority to issue them, payable to bearer, or order, are commercial, or negotiable, if they have the essential requisites of negotiable paper. Though sealed instruments find their recognition, validity and operation in the ancient rules of the common law, while bills of exchange and promissory notes find their origin and sanction and peculiar characteristics in the law-merchant, or in statutes intended to facilitate their circulation; the bonds of corporations, though under seal, after some vacillation of judicial decision, come to be recognized as on an equality with bank-notes and bills of exchange. A full collection of the authorities, State and Federal, will be found in 1 Waite's Actions & Defenses, 688. But, like bank-notes, or bills of exchange, or promissory notes, they must, in themselves, contain every essential requisite of negotiability. Where these are found in them, although they may be under the corporate seal, as every act of a corporation must have been manifested according to the ancient common law, the seal will not destroy their negotiability. But the seal will not confer negotiability, unless these requisites are found. Corporations may contract on conditions, or uncertain events, or on contingencies, as well as absolutely, and unconditionally; and if they do, such contracts have the same operation as the like contracts of individuals.

Without the aid of a special statute, the original act of incorporation not conferring the power, the city of Troy could not have issued negotiable paper.—*Police Jury v. Britton*, 15 Wall. 566; *N. M. & C. R. R. Co. v. Dunn*, 51 Ala. 128. Whether the power should be conferred, rested in the legislative discretion. While the legislature conferred on the city the power to subscribe to the capital stock of the Mobile & Girard Railroad, and to issue bonds to pay the subscription, it is expressly provided that "none of said bonds, or interest thereon, shall be due or payable, until said railroad is in running order, and the cars run to Troy." The bonds stipulate expressly on their face, that until this event happens, neither the bonds, nor the interest thereon, is payable. This is not an event which it can be said would certainly happen; not mere doubt, suspense as to the time of its happening, but uncertain whether it would happen; as uncertain as when a ship would arrive from sea, or discharge her cargo. The city was authorized to subscribe to the stock of the rail-

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road corporation, not so much for the benefits which would accrue from membership in it, or for the dividends which would be derived from the ownership of the stock. Such considerations would probably influence individuals; but a public corporation, created mainly for governmental purposes, would be authorized to make such a subscription, because of the incidental advantages to be derived from the completion of the road to its locality—the improved facilities for transportation and travel to and from it—the apprehended increase of its business, its trade, and industries. That payment for the stock should depend upon the completion of the road to the city, is a provision inserted in the bond for the protection of the city, and inserted in obedience to the command of the statute. The legislature did not confer power to issue negotiable paper—it did not intend that such power should be exercised. When the railroad was completed, yielding to the city the advantages and benefits contemplated, and which was the consideration moving the legislature to confer the power to subscribe for the stock, then the bonds were to be payable. The bonds are wanting in the essential element of negotiability, certainty of time of payment. Not being negotiable according to their terms, they could not become so by matter *ex post facto*. The subsequent completion of the railroad cannot change the character impressed on them at the time they were made.—*Kelly v. Hemmingway*, 13 Ill. 604; STORY on Prom. Notes, § 22.

Bills of exchange, promissory notes, or other negotiable paper, must be certain, not only as to the engagement to pay, the amount payable, and the fact or event of payment, but they must be certain as to the payee. "It is equally essential," says Judge STORY, "that the person, to whom the note is payable, should be clearly expressed, and made known upon the face of the note; for parol evidence is not admissible to show to whom it is payable; and in instruments designed for circulation, it is of the highest importance to know, to whom its obligations apply, and from whom a title can be securely derived."—STORY on Prom. Notes, § 35. The payee need not be named, but on its face the instrument must afford an indication or designation by which he can be certainly ascertained; the maxim applying, *Id certum est quod certum reddi potest*.—1 Dan. Neg. Instr. § 99. A bill may be drawn and negotiated, with a blank left for the name of the payee. Such a bill imports an authority from the drawer to a *bona fide* holder, to fill the blank with his own name; and such holder, perfecting the bill, may recover of the drawer.—Chitty on Bills, 156; *United States v. White*, 2 Hill, 57.

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In England, and in many of the States, a bill may be payable to bearer only; and then it becomes a promise to pay whoever may be the holder, and title to it will pass by mere delivery. So, if it is payable to A. B. or bearer, title will pass by delivery. Whether notes or bills, so framed, are negotiable, depends on the law of the place in which they are made and payable. It is within the sovereign power of each State, not offending the inhibition of the Federal constitution, by laws impairing the obligation of contracts already made, to regulate the making, construction, and validity, formalities and authentication of contracts, which are entered into, or to be performed within its territory. The legislature may enlarge, or may diminish, the character of paper which is negotiable—may add to or deprive it of the characteristics and qualities which distinguish it from other contracts.

We have statutes, which not only define the particular instruments which are governed by the commercial law, but change and modify many of the rules of that law. Bills of exchange, and promissory notes, payable in money at a bank or private banking-house, or a certain place therein designated, are the only instruments, which, under our statutes, are subject to the commercial law. Bank-notes, intended to circulate as money, would also be subject to that law; for these, as well as bills of exchange, and promissory notes, payable at a bank or banking-house, are exempt from set-off, discount, or payment, had or possessed previous to notice of transfer. It is expressly declared, that "all bonds, bills or notes, except those issued to circulate as money, payable to any thing or bearer, to any fictitious person or bearer, or to bearer only, must be construed as payable to the person from whom the consideration moved; if payable to an existing person or bearer, must be construed as payable to such person or order."—Code of 1876, § 2093. The original of this statute was entitled "an act to prevent fictitious suits in the courts of the United States;" and it will be found in Clay's Digest, 326, §§ 326-7. It was first construed in *Clark v. Field*, 1 Ala. 468, in which it was held, that under its operation, the legal title to a promissory note payable to *S. W. B. or bearer*, could not be derived otherwise than through the indorsement of the payee, *S. W. B.* In *Kemper and Noxubee N. & B. v. Schieflin & Co.*, 5 Ala. 473, it was held not to extend to bank-notes. In *Sawyer v. Patterson*, 11 Ala. 523, it was decided the statute did not extend to a blank indorsement, or an indorsement to bearer.

Such was the construction the statute had received prior to the Code of 1852. Into that Code it was introduced, in its present form. It is of frequent occurrence in that, and

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the present Code, that in the re-enactment of pre-existing statutes, the construction which judicial decision had placed upon them was embodied, or that the words of the statute were changed so as to conform to that construction. In this statute, we now find that bills or notes *issued to circulate as money* are excepted from its operation. These are still, as by the law-merchant, if payable to bearer, deemed payable to every holder thereof, and the legal title passes by delivery. Such was the construction of the former statute. The former statute declared instruments payable to any person, or to any corporation, or bearer, should have the effect of creating an obligation or liability in favor only of the person or corporation, to whom it was expressly payable. It may well be doubted whether the former statute embraced any instrument payable to *bearer* only. The present statute embraces not only such an instrument, but every instrument (except bills or notes issued to circulate as money) which is payable to any thing, or to any fictitious person, or *bearer*; and such instruments are not to be construed as payable to whoever may be the holder, but *to the person from whom the consideration moves*. If payable to an existing person or *bearer*, then it is construed as payable to such person, or order. The policy of the statute is to deprive instruments of negotiability, which do not on their face clearly indicate to whom their obligations apply, and from whom title can be securely derived; that title to negotiable instruments, which prevails over the title of the true owner, or over the equities of the original parties, shall be derived only by an indorsement in writing from him to whom they are expressly payable. Such, it is said by Judge STORY, was at one time the law of France; because it was found that bills of exchange, payable to bearer only, or in which a blank was left for the name of the payee, became a cover of fraud and usury. Story on Prom. Notes, § 38.

These bonds are payable to bearer only. If they had every other ingredient of negotiability, they could not, in obedience to the statute, be construed otherwise than as payable to the person from whom the consideration moved to the maker, when they were issued. So construing them, the legal title to them could be derived only through his indorsement. These are valid contracts, or engagements to pay money to the person from whom the consideration originally moved, on the happening of the event expressed in them. The legal title to them can be derived only through the indorsement or assignment of that person.—*Gookin v. Richardson*, 11 Ala. 889. Whoever obtains possession of them, without such assignment or indorsement, holds in subordination

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to it, and in subordination to all prior rights and equities.

The possession of the plaintiff was sufficient to support the present action of trover, against the defendants acquiring possession, without title, from his bailee. The defendants are, equally with the bailee, from whom they obtained possession, estopped from denying the title of the plaintiff. *Lowremore v. Berry*, 19 Ala. 130; *Cook v. Patterson*, 35 Ala. 102; *Donnell v. Thompson*, 13 Ala. 440.

The result of these views is, that the City Court erred in charging the jury the plaintiff was not entitled to recover, if they believed the evidence, and in refusing to charge them, on request, that he was entitled to recover.

Let the judgment be reversed, and the cause be remanded.

STONE, J., not sitting, having been of counsel.

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Supersedeas of Execution on Forfeited Replevin Bond.

1. *Lien of attachment, as affected by replevin bond.*—The levy of an attachment on personal property creates a lien, and places the property in the custody of the law; and the execution of a replevin bond neither destroys nor impairs this lien.

2. *Levy of junior attachment after replevy.*—When the property has been replevied, it is nevertheless still in the custody of the law, and the sheriff has no authority to levy a junior attachment on it.

3. *Remedy of sureties on replevin bond, for wrongful second levy.*—If a junior attachment is levied on the property after it has been replevied, the sureties on the replevin bond may interpose a claim, and try the right of property under the statute; and if the sheriff refuses to entertain the claim, on the ground that he has returned the attachment papers to court, the sureties may, by *mandamus*, compel him to receive and file their affidavit and bond.

4. *Discharge of sureties on replevin bond.*—When the property is taken from the sureties on the replevin bond, under a junior attachment, and delivered to the plaintiffs in that attachment, by whom it is removed and sold, the sureties on the replevin bond are discharged from their liability, and may supersede and quash a summary execution issued against them.

5. *Remedy of plaintiffs in first attachment.*—In such case, the plaintiffs in the first attachment have their remedy against the sheriff, for his unauthorized act in taking the property under the junior attachment, and may, possibly, maintain an action for money had and received against the plaintiffs in that attachment.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. H. D. CLAYTON.

This was a petition by F. M. Cordaman, to supersede and quash an execution issued against him, M. A. Wood, and David Barr, in favor of J. B. Knox and G. Y. Malone, as sur-

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living partners of the late firm of Knox, Malone & Knox. The averments of the petition, and the accompanying exhibits, show the following facts: On the 14th October, 1874, said Knox and Malone, as surviving partners, sued out an attachment, before the clerk of the Circuit Court, against David Barr, claiming \$200 for rent due on the 1st November, 1874; and the attachment was levied, on the next day, on 5,474 pounds of seed-cotton. On the 20th October, 1874, the property was replevied by said Barr, Cordaman and Wood becoming his sureties on the replevin bond; and by agreement between them and the sheriff, H. R. Segars, the cotton was "to remain in the possession, custody, and control of said Cordaman," in the gin-house of J. P. Wood & Brother in said county. On the 8th December, 1874, Coleman & Wiley, a mercantile partnership in said county, also sued out an attachment against said David Barr (together with one J. W. Barr), which was levied by J. W. Scarborough, the successor of Segars in the office of sheriff, on the same cotton; and the petitioner averred, on information and belief, that this levy was made, and the cotton was removed from the warehouse of said Wood & Brother, "with notice and knowledge on the part of the said sheriff and said Coleman & Wiley that the same was attached by Knox & Malone, and that said replevy bond had been given; that said Scarborough, at the time of the levy of said attachment by him, knew, or was informed, and had notice, or had reason to believe, and upon ordinary diligence could have ascertained, that said cotton, levied on by him, was the same that said Segars levied on at the suit of said Knox & Malone. Soon after the said levy by said Scarborough, petitioner informed him that said cotton was the same levied on by said Segars at the suit of Knox & Malone, and that it had been replevied as herein set forth; and the petitioner and his attorney directed, notified, and requested said Scarborough to hold and keep said cotton subject, liable to, and by virtue of said attachment of Knox & Malone, informing him that petitioner was surety on a replevin bond for the cotton in that suit; which request, notification and direction were made while said Scarborough was in possession of said cotton under said levy by him." Afterwards, on the 30th December, 1874, the petitioner (said Cordaman) made the statutory affidavit as claimant, and signed a statutory bond with two sureties, to try the right of property in the cotton, and presented them to the sheriff, who refused to accept them, "stating in substance, as a reason therefor, that he had returned the papers to court, or to the clerk, and he had nothing more, or would have nothing more to do with the matter." Afterwards, and

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before any forfeiture of said replevin bond, or return of forfeiture thereof, "said Scarborough permitted said Coleman & Wiley to take the custody, control, and care of said cotton,, or delivered the same to them; and they, or their agent, sold said cotton, and received the benefit of the sale, and it was by them, or through their instrumentality, it was shipped or sent out of the State of Alabama;" and all this was done before the rendition of judgment in the attachment suit of Knox & Malone, and before any forfeiture of said replevin bond, or return of forfeiture. Afterwards, in vacation, Coleman & Wiley dismissed their attachment; and at the ensuing April term, 1875, judgment by default was rendered in favor of the plaintiffs in the attachment suit of Knox & Malone. On the 27th May, 1875, the sheriff (Scarborough) returned the replevin bond forfeited; and an execution was thereupon duly issued by the clerk against said Barr, Cordaman and Wood, which was levied on lands belonging to said Cordaman, and which he sought to supersede by his petition in this proceeding. The petition alleged, also, that the sheriff (Scarborough) was indemnified by Coleman & Wiley.

The Circuit Court sustained a demurrer to the petition, and dismissed it; and its judgment is now assigned as error.

JOHN P. HUBBARD, for the appellant, cited *Edwards v. Lewis*, 16 Ala. 813; *Dunlap v. Clements*, 18 Ala. 778; *McRae & Augustine v. McLean*, 3 Porter, 138; *Rives & Owen v. Wilborne*, 6 Ala. 49.

OATES & DENT, with W. D. ROBERTS, *contra*, also cited 3 Porter, 138; 6 Ala. 45; and *Hagan v. Lucas*, 10 Peters, 400.

STONE, J.—Property levied on under attachment is thereby placed under a lien, which is perfected, and made available, when the attachment suit ends in a judgment for the plaintiff. Pending the suit, the defendant, or even a stranger, may replevy the property, and take it out of the actual custody of the sheriff. This, however, is a mere inexpensive mode of preserving the property until it is wanted for the payment of the judgment that may be rendered. Till the bond is forfeited, the property is in the custody of the law, and the lien is neither destroyed nor impaired.—Code of 1876, §§ 3280, 3289, 3291, 3325, 3326; *McRae & Augustine v. McLean*, 3 Porter, 138; *Rives v. Wilborne*, 6 Ala. 45; *Lusk v. Ramsay*, 3 Munf. 417; 1 Brick. Dig. 162.

Under these well-settled principles, the averments of the petition in this case clearly lead to the following conclusions: *First*: That by the prior levy of Knox & Malone's attach-

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ment on the cotton, they acquired a lien, which was made effectual by the judgment they afterwards recovered; and by virtue of their prior levy, they acquired a right to have the cotton sold, and to enjoy the proceeds, paramount to the claim asserted by Coleman & Wiley. *Second*: After the cotton was replevied, the sheriff had no authority to seize and remove the cotton under a junior attachment, because it was in the custody of the law.—*Kemp & Buckey v. Porter*, 7 Ala. 138. When the succeeding sheriff seized the cotton, under the junior attachment, it was the clear right of the sureties in the replevin bond to interpose a claim to the cotton, and to have a trial of the right under the statute.—Code of 1876, §§ 3341, 3290. *Third*: The claimants (sureties in the replevin bond) could have compelled the sheriff, by *mandamus*, to receive and file the affidavit and claim-bond, if legally sufficient, and to have desisted from further proceedings under his said levy, until the claim suit was disposed of. In the mean time, the claimant would, by force of such claim, be entitled to the possession and custody of the property. The return of the attachment, before the affidavit and claim-bond were presented, did not justify the sheriff in refusing to recognize the claim.

It will thus be seen that, according to the averments of the petition, the proceedings by which Coleman & Wiley obtained control of the cotton and its proceeds, were grossly irregular, and without any warrant of law. The case went off in the court below on demurrer sustained to the petition. This was an admission that all its material averments were true: Taking them as true, Knox & Malone were the landlords of Barr, and sued out their attachment for rent and advances sworn to be due, and had it levied in October on cotton grown on the rented premises. Soon afterwards, and in October, the cotton was replevied, Cordaman and Wood becoming sureties on the replevin bond. The attachment of Coleman & Wiley was issued in December, and was levied on the same cotton. Cordaman made the proper affidavit of claim, and tendered it and a claim-bond to the sheriff who had made the second levy; but the sheriff refused to receive them, saying he had returned the attachment papers to court. Failing to have his claim entertained, the claimant avers that the sheriff was notified that the cotton was the same which had been seized and replevied under the first attachment; and the sheriff was then requested to retain the cotton under the lien of the first attachment. The sheriff, in disregard of this knowledge and request, permitted Coleman & Wiley to take possession of the cotton, and remove and sell it. Coleman & Wiley thereupon dismissed their

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attachment in vacation; but, at the Spring term afterwards, Knox & Malone reduced the claim in their attachment suit to judgment. The cotton attached not being delivered to the sheriff within thirty days after the judgment, the sheriff indorsed the replevin bond forfeited, and execution was thereupon issued against Barr and his sureties on the replevin bond. The object of the present proceeding is to supersede and quash that execution.

In *McRae & Augustin v. McLean*, 3 Porter, 138, the questions presented and decided are not distinguishable from those raised in this record. It was ruled in that case, that the sureties in the replevin bond were released by the failure of the sheriff, when requested by the sureties, to retain the property and apply it, or its proceeds, to the first attachment. The case was well considered, and it has stood without assault, so far as we can learn, to the present time. It was quoted without dissent in *Rives v. Wilborne*, 6 Ala. 45. See, also, *Dunlap v. Clements*, 18 Ala. 778; *Hagan v. Lucas*, 10 Peters, 400; *Lusk v. Ramsay*, 3 Munf. 417. We are unwilling to depart from that case, which has stood as a guide for so many years. *Stare decisis*.

We are aware that, in this ruling, a seeming hardship is cast on Knox & Malone, without perceptible fault on their part. If the averments of the petition be true, they have recourse on the sheriff, for permitting the cotton to be delivered to Coleman & Wiley, and carried from the State; and certainly Coleman & Wiley have no right to the proceeds, as against Knox & Malone. Possibly, an action would lie for money had and received against them. In any point of view, taking the facts before us as a guide, the sheriff is without excuse. If, under the facts averred, Cordaman and Wood had been adjudged to pay for the cotton not delivered on their bond, the sheriff would have been liable to them, in a proceeding analogous to an action on the case, for the injury his unauthorized act inflicted on them; and this liability would probably extend to and embrace all persons who received the profits of his wrong, or knowingly aided him in their diversion from Knox & Malone's rightful, paramount claim.

The Circuit Court erred in sustaining the demurrer to the petition for *supersedeas*.

Reversed and remanded.

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Bill in Equity by Judgment Creditor, to set aside Fraudulent Conveyance by Debtor.

1. *Examination of title-deeds by purchaser; when chargeable with notice.*—A purchaser of lands has the right, and it is his duty, to examine every instrument which forms a link in the chain of his vendor's title; and he is chargeable with notice of every fact recited in any of those instruments, or appearing on their face; hence, when a deed is, on its face, fraudulent and void as against the grantor's creditors, a sub-purchaser from the grantee can not, as against those creditors, claim protection as a *bona fide* purchaser without notice.

2. *Answer, or decree pro confesso; effect as evidence against co-defendant.* Neither the answer of one defendant to a bill, nor a decree *pro confesso* against him, can have any effect as evidence against a co-defendant, who claims under a conveyance from the former executed before the filing of the bill.

3. *As to proof of fraud.*—Fraud is never presumed, but must be proved by the party asserting it; and it will not be imputed, when the facts and circumstances, from which it is supposed to arise, may reasonably consist with honest intentions; yet, on the other hand, it is not always required to be established by direct and positive evidence, but, like any other fact, may be proved by circumstances, each inconclusive, but all together leading to a well-grounded, rational belief of its existence.

4. *Conveyance by insolvent debtor to relative held fraudulent as to creditors.*—A conveyance, in form a deed of bargain and sale, reciting the payment of a valuable consideration, partly in cash, and the grantee's personal obligations, without security, for the residue payable in cotton, held fraudulent and void as against the grantor's creditors, notwithstanding the positive denials of both the grantor and grantee under oath as witnesses, on proof that, at the time of its execution, the grantor was insolvent, and pressed by a suit for a large amount, which ripened into judgment in a few months; that the deed conveyed all his visible property, except that which was exempt from legal process, and that which was incumbered to its full value; that the grantee was a young man not twenty-one years of age, with small pecuniary means, a relative of the grantor, and about to consummate a marriage with his daughter; that payment of the greater part of the purchase-money was, by the terms of the deed, to be made by annual installments through a series of six years; that the grantor remained in possession of the property; that a part of the lands were, within a short time afterwards, conveyed by the grantee to the grantor's wife, on a recited consideration which was fictitious; and that the parties united in raising money for their common benefit, by mortgages on the land, and pledges of the notes or obligations given for the unpaid purchase-money.

5. *Title of purchaser from fraudulent grantee.*—A purchaser from a fraudulent grantee may, as against the creditors of the grantor, set up the defense of a *bona fide* purchase for valuable consideration without notice, when the deed is not fraudulent and void on its face.

6. *Who is purchaser for valuable consideration.*—To establish the defense of a *bona fide* purchase for valuable consideration without notice, good faith and a valuable consideration (that is, money paid, a liability assumed, or an injury incurred) must concur: extending the day of payment of an antecedent debt, or taking a mortgage to secure a debt presently contracted, or an absolute purchase of property in payment of an antecedent debt, is a valuable consideration; but a mortgage to secure an antecedent debt, without any extension of the day of payment, is not.

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7. *Mortgage of wife's lands.*—A mortgage by husband and wife, of lands belonging to the wife's statutory separate estate, whether given to secure her own debt, or the debt of her husband or any other person, is an absolute nullity, and no rights can be acquired under it.

8. *Lien of execution.*—The lien of an execution does not vest in the judgment creditor either a *jus ad rem*, or a *jus in re*, and can not prevail against the prior equity acquired by a purchase for valuable consideration without notice before a levy.

APPEAL from the Chancery Court of Marengo.

Heard before the Hon. A. W. DILLARD.

The original bill in this case was filed on the 16th May, 1872, by Frank N. Kitchell, as the administrator *de bonis non* of the estate of James M. Rembert, deceased, against David Brooks Jackson and Lucius Kelly; and sought to set aside, as fraudulent and void, a conveyance executed by said Jackson to said Kelly, a copy of which was made an exhibit to the bill, and which was in the following words:

"This indenture, made and entered into this 8th day of March, A. D. 1869, by and between David B. Jackson and his wife, P. G. Jackson, of the first part, and Lucius Kelly, of the second part, all of Marengo, State of Alabama, *witnesseth*, that the said parties of the first part, for and in consideration of the sum of forty-two hundred dollars to them in hand paid by the said party of the second part, at and before the sealing of these presents, the receipt whereof is hereby acknowledged; and for the further consideration of *he*, the said Kelly, of the second part, executing to us his six promissory notes, or bonds, to be paid in cotton, as follows: firstly, his bond for forty-four bales of cotton, as payable and due to us, or our order, on the first day of January, or by that time at furthest; the cotton to be delivered as gathered and packed, of average quality, and in good order and condition, amounting to 22,000 pounds of cotton, to be delivered at 'Bickley's Landing,' or some other convenient point, which may be hereafter agreed on by us; which bond is to bear interest from the first day of January, 1870, estimating the cotton at twenty cents; and the second, for the same amount, 22,000 pounds, to be delivered as the above, and under the same requirements in every thing except the interest—there is to be no interest until the first day of January, 1872; the third payment, of 22,000 pounds, due and payable during the Fall of 1872, and by the first of January, 1873; and all the six payments, each amounting to 22,000 pounds of lint cotton, of average quality, and to be in good order, and to be delivered in equal annual installments, until the whole amount of the 132,000 pounds of cotton shall have been delivered and completed by the first day of January, A. D. 1876; which amount of 22,000 pounds of cotton, in equal an-

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nual installments, except the first, due the first day of January, to bear interest as hereinbefore stated, and to be delivered in bales, well wrapped, in good bagging and iron ties; and the said Kelly is to obtain receipts for the same from the warehouse-keeper, and furnish the same to the said parties of the first part, with the weight of each bale as delivered marked thereon: we, the said David B. Jackson and his wife, P. G. Jackson, have this 8th day of March, A. D. 1869, granted, bargained, and sold, and by these presents do grant, bargain, and sell and convey, unto the said Lucius Kelly, his heirs and assigns, the following described real and personal property; the realty consisting of the following tracts, or parcels of land, to-wit," particularly describing them, and stating the whole number of acres to be 2,420 acres, more or less. "To have and to hold unto the said Lucius Kelly, and unto his heirs and assigns forever, together with all and singular the appurtenances thereto belonging, or in any way appertaining. And we covenant and agree to and with the said Lucius Kelly, his heirs, executors and administrators, forever to warrant and defend the title to the above-bargained premises, to him, the said Lucius Kelly, against the claim or claims of all persons whomsoever claiming the same; as also all our corn, fodder, and provisions on our plantation, as well as our tools, teams, stock, consisting of about fifteen hundred bushels of corn, ten thousand pounds of fodder, twenty-five mules and horses, five pairs of oxen, sixty head of cattle, one hundred head of hogs, twenty-five head of sheep, three wagons, and all farming utensils on said plantation, as well as our prospective crop for the year 1869; the said Kelly binding himself to gather said crop in good time, and to ship the same to Watson, Erwin & Co., commission-merchants, of Mobile, Alabama, and to pay all our liabilities to them, the said Watson, Erwin & Co. In consideration of all which, we have set our hands, and *affix* our seals, this 8th day of March, 1869." (Signed by said Jackson and wife, attested by two witnesses, and admitted to record, on proof by one of the subscribing witnesses, on the 20th March, 1869.)

The complainant filed his bill as a judgment creditor of said D. B. Jackson, his judgment having been rendered under the following circumstances: On the 10th June, 1867, the complainant, as the administrator *de bonis non* of said Rembert's estate, recovered a decree in the Probate Court of Marengo county against Charles Irby, the administrator in chief of said estate, for \$9,692.28; on the 2d November, 1867, a garnishment on this decree was sued out against said D. B. Jackson, as the debtor of Irby; and on the 24th April, 1869, a judgment was rendered against him as garnishee, for

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\$6,195.20. The bill alleged that Jackson was largely indebted, and in fact insolvent, at the time he executed said conveyance to Kelly; that the conveyance embraced all his property, real and personal, "which was not already incumbered by liens for amounts greater than its value;" that it was executed with the intent to hinder, delay, and defraud the creditors of the grantor, and was fraudulent and void in law as against the complainant; that he could not obtain satisfaction of his judgment against Jackson, except out of the property conveyed by the deed; that executions on his judgment had been in the hands of the sheriff, continuously, since the 9th February, 1872; and that the conveyance cast such a cloud on the title to the property, that it would not command an adequate price at a sale by the sheriff. The bill prayed that the conveyance might be declared null and void; that the property conveyed by it might be sold, and the proceeds applied in satisfaction of the complainant's judgment against Jackson; that an account might be taken of the hire and rents with which Kelly was chargeable; and for general relief.

The defendants filed a joint demurrer to the bill, but the record does not show any action or decision upon the demurrer. Afterwards, on the 2d February, 1874, a decree *pro confesso* was entered against them for want of an answer. On the 10th February, 1874, an amended bill was filed, bringing in, as defendants, Mrs. P. G. Jackson (the wife of said D. B. Jackson), the Planters' and Merchants' Insurance Company (a corporation doing business in Mobile), C. E. Thames & Co. (a mercantile partnership in Mobile), and Malone & Foote (also a mercantile firm in Mobile); "all of whom," it was alleged, "claim to have an interest in the tract of land and other property mentioned in said bill of complaint, but complainant is not informed what that interest is." Malone & Foote filed a disclaimer, and the bill was dismissed as to them. A joint answer was filed by Thames & Co. and the P. & M. Insurance Company, setting up several mortgages executed by said Jackson and wife and Kelly, to said Thames & Co., and by them assigned to said P. & M. Insurance Company; detailing all the transactions between said Thames & Co., Jackson, and Kelly, out of which the mortgages originated; insisting on the validity of the conveyance by Jackson to Kelly, and claiming to be entitled to protection as *bona fide* purchasers for valuable consideration without notice. An amendment of the bill was afterwards added by consent, alleging that, after the filing of the original bill, the complainant's decree against Irby was paid by H. A. Woolf and J. E. Poelnitz, who were sureties on said Irby's bond as ad-

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ministrator, and was thereupon assigned to them by the complainant; and that the suit was prosecuted for their benefit.

On final hearing, on pleadings and proof, the chancellor held that the conveyance by Jackson to Kelly was fraudulent and void on its face, and rendered a decree for the complainant in accordance with the prayer of the bill. From this decree Thames & Co. and the P. & M. Insurance Company appeal, and here assign it as error.

W. E. & R. H. CLARKE, and WATTS & SONS, for appellants.

W. A. GUNTER, *contra*.

BRICKELL, C. J.—The bill was filed by the appellee, a judgment creditor of D. Brooks Jackson, to vacate a conveyance of lands and personal property, dated March 8th, 1869, made by said Jackson to Lucius Kelly, because it was intended to delay, hinder, and defraud the creditors of the grantor. The deed is of bargain and sale, reciting, as its consideration, the payment in money by Kelly to Jackson, of the sum of forty-two hundred dollars, and his six several obligations for the payment, by the first day of January, 1870, and each successive year until and including the first day of January, 1875, of forty-four bales of cotton, weighing in the aggregate twenty-two thousand pounds, at twenty cents per pound. Jackson and Kelly were originally the only defendants to the bill; and they, after having demurred, made no further defense, but suffered the original and amended bills to be taken as confessed. Mrs. Priscilla E. Jackson, the wife of the grantor, C. E. Thames & Co., and the Planters' and Merchants' Insurance Company, were brought in by an amended bill, upon the allegation that they claimed some interest, the value of which was unknown, in the property covered by the deed.

As errors are assigned only by Thames & Co., and the P. and M. Insurance Company, it is not necessary to refer, for an understanding of the questions to be decided, to any other of the pleadings than their answer. They deny that the conveyance to Kelly, made by Jackson, was intended to hinder, delay, and defraud the creditors of the latter; and insist that it was made in good faith, upon an adequate and valuable consideration. However this may be, they aver that they stand as *bona fide* purchasers from Kelly, without notice of any fraud infecting the conveyance to him, which is fair and valid upon its face, and have an equity superior to that of the appellee as a judgment creditor of Jackson. The case thus resolves itself into two inquiries: 1st, whether

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the conveyance from Jackson to Kelly is fraudulent as to the creditors of the former; 2d, if it be fraudulent, whether Thames & Co., and the P. and M. Insurance Company, are entitled to protection as *bona fide* purchasers from Kelly.

1. The chancellor seems to have been of the opinion, that, on its face, the conveyance to Kelly was fraudulent and void as to the creditors of Jackson. If that was true, it would be decisive of the case in all its aspects; for, of all that appears upon the face of that conveyance, to those subsequently dealing with Kelly, and acquiring rights which must be traced to it, notice must be imputed conclusively. A purchaser has the right, and it is his duty, to examine every instrument forming a link in the chain of title; and of such instruments, the presumption is, that he has knowledge; because he has the means of acquiring it, and if he does not acquire it, his own negligence is the cause of his ignorance, and it is not the negligent the law favors.

But, it is an error to suppose the conveyance is, on its face, fraudulent as to the creditors of the grantor. In form, consideration and covenant, it is an ordinary deed of bargain and sale; not disclosing that the grantor was embarrassed by debt, or that there was any incapacity of entering into the bargain resting on the grantee, or that any other relation than that of which it is evidence, vendor and vendee, existed between the parties. Whatever of suspicion may cloud it—whatever may be the evidence of fraud it was intended to consummate, depends upon extrinsic evidence. It does not require any extended discussion of that evidence to satisfy the mind that, though the chancellor was in error, in pronouncing the conveyance fraudulent on its face, he was not in error in his conclusion, that the evidence showed satisfactorily that it was not *bona fide*, but colorable—intended and used to hinder, delay, and defraud the creditors of the grantor.

2. We do not inquire, whether Kelly and Jackson have fairly explained the causes which induced them to suffer the bills to be taken as confessed; nor whether, if they alone were interested in the result of the suit, they could lessen or qualify the effect of the decree, by any evidence, or explanation whatever. Before the filing of the bill, and, of consequence, before the rendition of the decree, the mortgages they had executed to Thames & Co., and the assignment of the latter to the P. and M. Insurance Company, were operative. There was no identity, or community of interest; no combination, or collusion, shown or averred, which would render them subject to be affected by the admissions or the laches of Kelly and Jackson. If the latter had answered, admit-

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ting all the allegations of fraud, and every matter of fact essential to the appellee's right of recovery, the answer could not have been read as evidence against their co-defendants. The decree *pro confesso* is no more than the admission of record by them, as such an answer would have been, of the truth of the allegations of the bill; and while binding and conclusive upon them, is not evidence against their co-defendants.—*Julian v. Reynolds*, 8 Ala. 680. It must, therefore, be conceded that, as against the appellants, the fraud in the conveyance to Kelly must be proved as averred, and as fully proved as if Kelly and Jackson had entered into the litigation, denying the fraud, and insisting upon the validity of the conveyance.

3. It must also be conceded to the appellants, that the burden of proof rests upon the appellee. It is a general, if not a universal rule, that a plaintiff in an action at law, or a complainant in a suit in equity, assumes the burden of proving every affirmative fact, essential to his right of recovery. No material fact is presumed; and the rule is general, in courts of law and of equity, that a party relying upon fraud, must aver it with certainty, and must prove it as averred. It is often said, the law never presumes fraud; and that it will not be imputed, when the facts and circumstances, from which it is supposed to arise, may reasonably consist with pure intentions. This is certainly true, when no confidential relation exists between the parties, subjecting the one to the influence and control of the other, and disadvantageous bargains or contracts have been made, by which the one in whom confidence is reposed derives profit, and the other sustains detriment. But, it must not be supposed that fraud must be proved by direct and positive evidence, and is incapable of proof by circumstances leading to a well-grounded, rational belief of its existence. There is no fact which may be the subject of controversy in a judicial proceeding, civil or criminal, that is not the subject of proof by circumstantial, as distinguished from positive or direct evidence.

Where a fraud is contemplated and committed upon creditors, concealment of it is the first, and generally the most persistent, effort of those who are engaged in it. Publicity would render their acts vain and useless. Leaving direct and positive evidence, accessible to those injured by it, would be the equivalent of a confession of the culpable intent, and of the defeasible character of the transaction. There are numerous circumstances, so frequently attending sales, conveyances and transfers, intended to hinder, delay, and defraud creditors, that they are known and denominated *badges of fraud*. They

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do not constitute—are not elements of fraud, but merely circumstances from which it may be inferred. So, there are many circumstances, from which crime, and the identity of the criminal agent, may be inferred; yet no one of them, in itself, criminal. When a fact is proved, or to be proved, by circumstantial evidence, the concurrence of a number of independent circumstances, each tending to prove it, increases and strengthens the probability of its truth. They may be, each and all, explained, and their probative force lessened, if not destroyed. But the absence of evidence in explanation, or weakening or neutralizing their force, adds to the probability of the truth of the conclusion to which they point.

4. It is but seldom that, in any one case, so many badges of fraud, so many circumstances indicative of an intent to hinder, delay, and defraud creditors, can be found, as were attendant upon the particular transaction we are investigating. The grantor was insolvent, and pressed by suit, ripening into judgment, for a sum exceeding six thousand dollars, in less than two months after the sale and conveyance of all his visible, tangible property, not exempt from execution, or not incumbered with liens exceeding its value. The sale is to a relative, engaged in a contract of marriage to his daughter, which is consummated in the course of the current year. A credit of six years is given for the payment of the larger part of the purchase-money to the vendee, not of pecuniary ability to make so large a purchase, and laboring under the disability of infancy, incapable of entering into a binding contract of purchase. The conveyance recites forty-two hundred dollars of the purchase-money was paid in cash; yet it was not paid, but the vendee assumed to his brother the payment of a debt of forty-five hundred dollars owing by the grantor, on the promise of the latter to account for the excess of three hundred dollars. In less than six months, the vendee, probably about the time he became of age, conveys a part of the lands, including the homestead, in the possession of which the grantor remained, to the wife of the grantor; the conveyance reciting, as its consideration, forty-five hundred dollars in cash, paid by the wife. The payment was not made; but the real consideration was, the promise of the husband to surrender and cancel one of the obligations given by Kelly to him for the purchase-money. The obligation was not surrendered until February, 1872, and no demand for it seems to have been previously made. These obligations were pledged, and employed to enable the vendee to raise money; and finally, in February, 1872, when Kelly is desirous of extending the time of payment of a large debt he had contracted in cultivating the lands, and obtaining a fur-

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ther advance, and Jackson is desirous of obtaining an advance of money and credit, all but the one surrendered, are pledged; and mortgages on all the lands are given by Kelly and Mrs. Jackson to secure the payment of all the debts, Kelly's and Jackson's.

These circumstances are unexplained—there is an absence of all evidence having a tendency to lessen their weight, or the probability of the truth of the conclusions to which they lead. The vendor and vendee, it is true, in their testimony, deny and disclaim all intent to hinder, delay, and defraud the creditors of the grantor, and avow the fairness of the transaction. But these facts and circumstances outweigh all such general declarations—they speak an unequivocal language, which can not be answered by a mere denial of its truth, or protestations that the inferences, to which they reasonably lead, are not true and just. Kelly denies all knowledge of the pendency of the suit against Jackson, or of his embarrassment or insolvency, when he entered into the contract of purchase, and received the conveyance. The denial may or may not be true—in the present controversy, its credibility depends upon its consistency with the opposing evidence, with which it must be compared. His relationship to the grantor, the nearer relation then contemplated, and his long intimacy in the family, are, of themselves, facts tending to fix upon him knowledge of the grantor's embarrassment, insolvency, and of the pendency and pressure of suit against him. Combine them with the unusual character of the transaction—a man of age and experience in planting, making a sale and conveyance of his plantation, stock, farming utensils, and all his visible, tangible property, not exempt from execution, or incumbered by liens, to a young man of small pecuniary ability, not of age, of but little experience in planting, on a long credit, not requiring from him security of any kind; and the conclusion seems irresistible, that some other motive than a mere sale of the property, it must have appeared to Kelly, was operating on the grantor. It would be strange, if he did not know, that he made no inquiry as to the motive; and if he made inquiry, that is not stated. The more rational and juster inference is, that he knew of Jackson's embarrassment—of the pending suit which would soon pass into judgment, from which liens could be created, and incapacitate him from making any disposition of his property prejudicial to the diligent creditor. Without dwelling further upon this branch of the case, we concur in the conclusion of the chancellor, that the sale and conveyance to Kelly was not *bona fide*—that it was colorable—in-

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tended and employed to hinder, delay, and defraud the creditors of the grantor.

5. It was at one time held, by some authorities, that a *bona fide* purchaser, from a fraudulent grantee, was not entitled to protection against the claims of the creditors of the fraudulent grantor.—*Roberts v. Anderson*, 3 Johns. Ch. 371; *Preston v. Crofut*, 1 Conn. 527; *Hoke v. Henderson*, 3 Dev. 12. The argument, by which the doctrine was supported, was that, by the very terms of the statute of frauds, the conveyance was pronounced *utterly void, frustrate, and of no effect*, and a subsequent conveyance from the fraudulent grantee, of consequence, could have no foundation on which to rest. It was also argued, that it was against the policy of the statute to afford protection to a subsequent purchaser from the fraudulent grantee, though he parted with value, in ignorance of any infirmity in the title he was acquiring.

Quoting the words of Ch. KENT: "Its object" (the statute) "was, to secure creditors from being defrauded by the debtor; and the danger was, not that he would honestly sell for a fair price, but that he would fraudulently convey, upon a secret trust between him and the grantee, at the expense of the creditors. If the debtor sells himself, in a case where the creditor has no lien, and sells for a valuable consideration, he acquires means to discharge his debts; and it may be presumed he will so apply them. If his fraudulent grantee be enabled to sell, the grantor cannot call those proceeds out of his hands, and the grantee can either appropriate them to his own use, or to the secret trusts upon which the fraudulent conveyance was made. There is more danger of abuse, and that the object of the statute would be defeated, in the one case, than in the other." The decree of Chancellor KENT was reversed on error (*Anderson v. Roberts*, 18 Johns. 516); and it was dissented from, and the contrary doctrine held by Judge STORY, in *Bean v. Smith*, 2 Mason, 252. The case of *Hoke v. Henderson*, 3 Dev. 12, was expressly overruled in the more recent case of *Young v. Lathrop*, 67 N. C. 63; *S. C.*, 12 Am. Rep. 603. And now, in nearly, if not all the States, the doctrine is settled, that a fraudulent conveyance will not, at the instance of the creditors, be vacated to the prejudice of an innocent purchaser from the fraudulent grantee.—2 Lead. Eq. Cases, 42; Bump on Fraud. Conv. 480-490; 4 Kent, 464.

This doctrine was announced in the cases of *Abney v. Kingsland*, 10 Ala. 355; *Reed v. Smith*, 14 Ala. 380; *Bryant v. Young*, 21 Ala. 264; *Cummings v. McCullough*, 5 Ala. 324. Though, in express terms, the statute of frauds declares a conveyance or assignment, in writing, or otherwise, made

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with intent to hinder, delay, or defraud creditors, purchasers, or other persons, void, it is so declared only "against the persons who are, or may be, so hindered, delayed, or defrauded, their heirs, personal representatives, and assigns." Code of 1876, § 2124. All our decisions have pronounced, that conveyances, grants, or assignments, in fraud of creditors, are valid and binding between the parties, passing the title; that they are merely voidable at the instance and election of those aggrieved by them. Strangers cannot impeach them, and, until creditors or purchasers call them in question, they are as effectual, as similar transactions fair and *bona fide*, uninfected by a covinous intent.—2 Brick. Dig. 16, § 45. Having the title, no infirmity appearing on its face, the fraudulent grantee has the incident of the title, the right of alienation; and its undisclosed infirmity, of which only creditors or purchasers can take advantage, is cured, and the title in the hands of a *bona fide* purchaser ceases to be defeasible at their instance and election. Any other principle would embarrass the alienation of property, and involve innocent purchasers in loss as grievous, subject them to frauds as obvious, as the loss, or the frauds, against which the statute of frauds intends to protect creditors of, and purchasers from the original fraudulent grantor.

"If a suit be brought to set aside a conveyance," said C. J. MARSHALL, in *Fletcher v. Peck* (6 Cranch, 33), obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with the confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if the principle be overturned."

6. A *bona fide* purchaser, entitled to protection against prior equities, or latent infirmities in the title of his vendor, who is apparently seized, and in the transaction with him pretends to be seized in fee of the legal estate, is one who, in good faith, without notice, parts with value, or changes his position for the worse, under the belief that he is acquiring the legal estate. Good faith, and a valuable considera-

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tion, are the essential elements of a *bona fide* purchase a court of equity will not disturb. The two must concur. A mere volunteer may in good faith acquire the estate, but protection is not afforded him; nor is it afforded to a purchaser parting with value, having notice of the prior equity, or the latent infirmity of the title. It is not an absolute sale and conveyance, which alone will entitle the purchaser to protection. A mortgagee, acquiring the estate as a security for a contemporaneous debt, is entitled to the same protection as the grantee in an absolute conveyance.—*Boyd v. Beck*, 29 Ala. 713; *Wells v. Morrow*, 38 Ala. 125. The mortgage then enters into, and forms part of the consideration, upon which credit is given. But, if the mortgage is a mere security for an antecedent debt, the mortgagee will not be entitled to protection. The reason is, that the mortgage places him in no worse condition than he was, before accepting it; he parts with nothing of value, the debt due him continuing unchanged in obligation; and there is no ground upon which protection against the older equity, or prior right, can be founded.—*Manhattan Co. v. Evertson*, 6 Paige, 457; *Agricultural Bank v. Dorsey*, 1 Freeman's Ch. 338. But a creditor, purchasing in payment of a pre-existing debt, will be protected.—*Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 866. And if the mortgage is given in consideration of the forbearance to sue on a pre-existing debt, or in consideration of an extension of the day of payment, a new consideration thus intervening, of detriment to the creditor, the mortgagee will be protected as a *bona fide purchaser*.—2 Lead. Eq. Cases, 32, 84.

As to the debt due from Kelly, and the liability incurred by the acceptance of the bill of Jackson & Cline, Thames & Co. must be regarded as purchasers in good faith, without notice, so far as the mortgage executed by Kelly is concerned. The extension of the day of payment of the debt of Kelly, and incurring the liability of acceptors of the bill of Jackson & Cline, was the present, moving consideration of the mortgage. By it, they were induced to give a new credit to Kelly, and to incur the liability of accommodation acceptors for Jackson & Cline. They are, also, entitled to protection, so far as they had made advances to Kelly, and to Jackson & Cline, upon the agreements contemporaneous with the mortgage, before receiving notice of the fraud in the conveyance from Jackson to Kelly. That notice, it appears, came to them at some time in the summer of 1872; the precise date is not shown. If, subsequently, they continued advances, under their agreements, they are not entitled to protection for them. The notice precluded them from continuing the advances, as it would preclude a purchaser for money from

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continuing to pay the purchase-money after notice of the prior right or equity.

7. The conveyance from Kelly to Mrs. Jackson created in her a statutory separate estate, which she was incapable of incumbering by mortgage, as security for her own debt, or the debt of another. A mortgage given by her, for either purpose, is an absolute nullity. It does not resemble, or bear any analogy to the conveyance of an infant, or to a conveyance fraudulent as to creditors. It is a thing done against law, at the very time of doing it, and no person is bound by it. That principle is too firmly established by the former decisions of this court, to be now matter of discussion. *Bibb v. Pope*, 43 Ala. 90; *Wilkinson v. Cheatham*, 45 Ala. 337; *Weil v. Pope*, 53 Ala. 585; *Peebles v. Stalla*, 57 Ala. 53. The consequence is, by the mortgage executed by Jackson and wife, Thames & Co. acquired no title, legal or equitable, to the property it purported to convey. They knew of her coverture, and notice to them of the character of the estate created by the conveyance to Kelly must be presumed. A party claiming protection as a *bona fide* purchaser, must show an equity clothed with the legal title, acquired without notice of the prior equity, from which he claims protection. The mortgage being void, it neither creates an equity, nor transfers the legal title. The conveyance from Kelly to Mrs. Jackson is fraudulent and void as against the appellee and other creditors of her husband. It is not founded on any valuable consideration proceeding from her, but is merely a part of the scheme contrived by Jackson, in which Kelly participated, to defraud the creditors of the former.

8. It is true that, as between Jackson, Kelly, and the appellee, the execution issuing on the judgment in favor of the appellee operated a lien on all the property conveyed by Jackson to Kelly, and the conveyance was not an obstacle to the enforcement of the lien by levy and sale.—*Carter v. Castleberry*, 5 Ala. 277. As to the appellee, the conveyance was void, and a levy of execution against the grantor would have been an incipient legal step to its avoidance. The purchaser, at a sale under the execution, would have been a subsequent *bona fide* purchaser, as to whom the conveyance would have been void. But, Kelly having the legal title, the lien of the execution could not defeat or impair the title and equity of a *bona fide* purchaser from him, under a conveyance made before there was a levy. Whether, if there was a levy, the title and equity of such a purchaser would be affected by it, we do not consider, or intend to be understood as intimating any opinion. The lien of an execution does not vest in the judgment creditor either a *jus in re*, or a *jus ad rem*. It is simply

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a right by law to charge the property of the judgment debtor which is subject to levy and sale, with the payment of the debt; operating as an incumbrance on it, of which all who subsequently deal with him must at their peril take notice. It is not unreasonable to compel them to take notice, as they are compelled to take notice of prior registered conveyances. An examination of the public records, in either case, will lead them to notice; and it is their own negligence, if they do not make it. Such an examination, in the present case, would have led to the ascertainment of the conveyance from Jackson to Kelly, disarming inquiry as to judgments or executions against Jackson, and directing it only as to judgments or executions against Kelly. When the principle is admitted, that a *bona fide* purchaser from a fraudulent grantee is entitled to protection against the demands of the creditors of the fraudulent grantor, it follows necessarily, that if the purchase is made before the creditors acquire a specific lien upon the property purchased, the protection must be extended, though there may be the general lien of an execution.—*Williams v. Lowe*, 4 Humph. 62; *Ledyard v. Butler*, 9 Paige, 132; *Young v. Lathrop*, 67 N. C. 63; Freeman on Executions, § 140; Bump on Fraud. Conv. 481.

The decree of the chancellor must be reversed, and the cause remanded, for further proceedings in conformity to this opinion.

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Trespass Quare Clausum Fregit.

1. *Decedent's lands; title and rights of heir, as affected by statutory powers of personal representative*—On the death of a person intestate, seized of a heritable estate in lands, the title descends *eo instanti*, and vests in the heir, and with it all the common-law rights and incidents of ownership, subject to the exercise by the administrator of the statutory powers with which he is clothed for the purposes of administration; and until these statutory powers are effectively asserted by the administrator, the title and rights of the heir remain unimpaired and unaffected.

2. *Same; when heir may maintain action for trespass on lands*.—The heir may maintain an action at law for a trespass on lands descended to him, although the administrator had, prior to the commission of the trespass, obtained an order to sell them for the payment of debts, but had never sold them under the order, nor otherwise exercised any of his statutory powers

* This case was decided at the December term, 1878, and was prepared for publication in the 62 volume of Reports. Neither the record nor the briefs have come to the hands of the present Reporter.

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over them, and had resigned his administration before the commencement of the action.

3. *Municipal ordinance, as to title and rights of purchaser at tax-sale.*—An ordinance of a municipal corporation, which makes it the duty of the tax-collector to put the purchaser in possession of lands sold for taxes, and authorizes the mayor, "if necessary," to direct the police to put him in possession; and which also declares that the certificate given to the purchaser "shall be evidence of a right to possess the premises therein specified, and to retain them until redeemed as provided by the charter, and, if the property is not redeemed within the time prescribed by the charter, shall operate as a deed of conveyance,"—is violative of the constitutional provision, contained in the 7th section of the 1st article, which declares that no person shall be deprived of his property "but by due process of law."

APPEAL from the Circuit Court of Madison.

Tried before the Hon. LOUIS WYETH.

This action was brought by Marie M. A. Calhoun, against Algernon S. Fletcher, to recover damages for a trespass on a house and city lot in Huntsville, alleged to have been committed by the defendant on or about the 1st April, 1872; and was commenced on the 21st of July, 1875. The defendant pleaded not guilty, and issue was joined on that plea. It appeared on the trial, as the bill of exceptions states, that the property had belonged to Mrs. Mary S. Calhoun, who was the plaintiff's mother, and who had died, intestate, several years before the commission of the alleged trespass, leaving the plaintiff and one son as her only heirs at law; and that on the 19th June, 1871, a conveyance of the premises was made to the plaintiff by her said brother, for the purpose of effecting a division of their mother's property between them. The defendant entered on the premises, at the time of the alleged trespass, claiming them under a purchase at a sale for unpaid taxes made by the municipal authorities of the city of Huntsville, as hereinafter more particularly stated.

On the trial, George P. Beirne testified, in behalf of the plaintiff, that he was a member of the firm of Beirne & Gordon, attorneys at law in Huntsville; that said partnership existed from the year 1866 until the 5th October, 1872, when it was dissolved by the death of said Gordon; that Beirne & Gordon were the plaintiff's agents and attorneys, and had the control and management of all her property, for the purpose of renting it out, and for all the purposes of a general management; that they, as such agents and attorneys, had possession of said house and lot on the day of the alleged trespass by the defendant; that the defendant never had possession of the property by or with his consent, or the consent of Beirne & Gordon; that the property had been rented to the United States until the year 1871, and, after the expiration of said lease, was in the possession of Beirne

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& Gordon; that the only occupant of the premises, at the time of the defendant's entry and trespass, was an old negro man, a family servant, who occupied a room in the basement, and was there for the purpose of taking care of the property, according to the wishes of the plaintiff, and by the direction of her said agents; and that the house was closed and locked, and the keys in the possession of Beirne & Gordon.

H. L. Clay, a witness for the defendant, testified that Mrs. Calhoun, the plaintiff's mother, died in 1871; that letters of administration on her estate were granted to him (witness) in December, 1871, by the Probate Court of Madison, and he resigned in April, 1874; that he went to the premises, shortly after his appointment as administrator, and found that he could only enter by the back gate; that he entered, and found on the premises an old family servant named Fred; that he asked Fred why he was there, and he replied, 'The Calhouns asked him to stay there and take care of the premises.' Witness said, that he had never rented the premises to any one, though he remembered to have had an application to rent a part of the house, but the contract was never ratified or concluded; and that he had never had possession of the keys of the house, which he had found closed and locked. The defendant read in evidence, also, a petition filed in the Probate Court of Madison by said H. L. Clay, as administrator of Mrs. Calhoun, asking an order to sell certain real estate, including said house and lot, for the payment of debts, and an order of sale granted on said petition. The petition was dated the 13th January, 1872, and the order of sale was granted on the 9th April, 1872; but it was proved that the administrator had never sold, nor attempted to sell, said house and lot under said order or decree. The defendant testified, as a witness for himself, that he purchased the premises, at a sale for unpaid taxes made by the corporate authorities of the city of Huntsville, on the 1st April, 1872; that he was put in possession by Mr. Murphy, the city tax-collector; that the only person on the premises at the time was an old negro named Fred, to whom he rented a basement room; that he rented the premises, soon after he had taken possession, to one Cleaveland; that he saw, when he purchased the property, that the certificate of purchase gave him the right of immediate possession; that on paying the money, and applying to the tax-collector for possession, he was told by the collector to go in, and, if he met with any difficulty, he would be put in possession by the police; that when he rented the place to Cleaveland, he referred him to Mr. Clay for the keys: that he did not know Beirne & Gor-

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don were the plaintiff's agents, and did not himself ask any body, except the tax-collector, for the keys, or for possession; and that he received from the tax-collector, at the sale in April, 1872, a certificate of purchase for the property. An ordinance of the city of Huntsville, in reference to the sale of property for unpaid taxes, was also read in evidence by the defendant; the material portions of which, as contained in section 101, are stated and copied in the opinion of the court.

The court charged the jury, among other things, as follows: "If you believe, from the evidence, that H. L. Clay became the administrator of the estate of Mrs. Mary S. Calhoun, and, as such administrator, filed his petition for the sale of this land in the Probate Court of Madison county; and that he afterwards went on the land, and notified the servant or agent of plaintiff that he was such administrator, and, as such administrator, then took possession of the premises said to have been trespassed upon; and that all this was done before the alleged trespass; and that afterwards, up to the time of the alleged trespass, nothing occurred to change this condition of things; then the possession, and the possessory right to this property, at the time of the alleged trespass, was in the said H. L. Clay as such administrator, and was not in the plaintiff." The court charged the jury, also, "that there was nothing in the constitution and laws of Alabama, which prohibited the mayor and aldermen of Huntsville from enacting so much of section 101 in the Code of Ordinances as authorizes the collector to put the purchaser in possession of the premises sold for taxes, within thirty days after the execution of the certificate of purchase, or which forbids the collector from acting in accordance with that law."

The plaintiff excepted to each of these charges, and requested several charges, which were in writing, and of which the court refused the following:

"1. If the jury find, from the evidence, that at the time the defendant entered upon and took possession of the property in dispute, the premises were in the possession and control of Beirne & Gordon, as attorneys and agents of the plaintiff, and the house was locked up, and they had the keys to it; then the plaintiff had such possession as would entitle her to maintain this action, although Beirne & Gordon, at the same time, by direction of the plaintiff, permitted the negro man Fred to occupy a room in the basement and kitchen part of the house."

"5. If the jury believe, from the evidence, that the plaintiff was in possession of the property, by her servant, at the

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time of the alleged trespass, then this is such possession as will entitle her to maintain this suit; provided they further find that there was no other actual occupant of any portion of said premises at the time, and that the administrator had not rented the property, or obtained from the Probate Court an order to sell it."

"6. The mere fact that the administrator filed his application in the Probate Court, praying an order to sell the real estate for the purpose of paying debts, before the sale of the property to the defendant for the payment of taxes due the city, did not constitute such action on the part of said administrator as would intercept the rights of the plaintiff, as heir, in and to the real property in controversy in this suit."

"8. The ordinance of the city of Huntsville numbered 101, or section 101 of said ordinances, which has been offered in evidence in this case, is unconstitutional and void, because contrary to the constitutional guaranty that no one shall be deprived of his property without due process of law."

The refusal of these charges, to which the plaintiff excepted, and the charges given by the court and excepted to, are now assigned as error.

HUMES & GORDON, for the appellant.—1. The title to the property alleged to have been trespassed upon, was in the plaintiff at the date of the commission of the trespass. The administrator had not then sold, nor obtained an order to sell, and he had not taken possession. The title to lands sold by order of the Probate Court, to pay the debts of the ancestor, is not divested out of the heirs, until the administrator, in accordance with an order of the court, conveys title to the purchaser; and without such title, the purchaser can not resist ejectment by the heir.—*Doe v. Hardy*, 52 Ala. 292; *McCully v. Chapman*, 58 Ala. 325. The title, at the time of the commission of the trespass, being in the plaintiff, and no one being in the actual occupancy of the premises, the title drew to it the constructive possession, which would enable plaintiff to maintain the suit.—*Shipman v. Baxter*, 21 Ala. 456. The single question, then, remains, Did the mere filing of the petition to sell by the administrator operate in any sense to defeat plaintiff's right to sue for the injury to the possession? We have found no authority which maintains, even indirectly, the affirmative of this proposition; and the contrary has been expressly decided in the following cases: 23 Mo. 99; 17 Vermont, 489; 43 N. H. 326.

2. The ordinance, section 101 of the ordinances of Huntsville, is clearly unconstitutional. It attempts to deprive an

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owner of his property, without any judicial proceedings, or any due process of law; without affording him any opportunity to appear and contest the validity of the sale, or the right of the purchaser to possession. Such a power the legislature did not intend to confer; and even if it had been expressly granted, it is beyond the scope of legislation, and in the teeth of the constitution. It gives to the certificate the force and effect of a judgment, rendered after due notice and trial. Such an ordinance can not be the law of the land. It is simply pure confiscation. This court has more than once passed on similar enactments, and their utter invalidity has always been declared.—See *Stoulenmire v. Brown*, 48 Ala. 699; *Whitworth v. Anderson*, 54 Ala. 33; *Ex parte Webb*, 58 Ala. 109.

BRANDON & JONES, *contra*.—1. At the time of the alleged trespass, the possession of the property was in Clay, the administrator of Mrs. M. S. Calhoun; and this defeats the plaintiff in the present action. The heirs of an estate take the land subject to the statutory power of the administrator to have it appropriated to the payment of debts. When the administrator takes steps to assert this statutory power, the heir loses the right to possession.—26 Ala. 432; 21 Ala. 411; 10 Ala. 60. The possession of the servant is not sufficient to maintain the action.

2. Mr. Cooley says, upon the general power of taxation: "The power of taxation is an incident of sovereignty, and is co-extensive with that of which it is an incident. All subjects, therefore, over which the sovereign power of the State extends, are, in its discretion, legitimate subjects of taxation; and this may be carried to any extent to which the government may choose to carry it."—Cooley on Taxation, 3. The constitutional guaranty, which has come to us from the *Magna Charta*, that no person shall be deprived of life, liberty, or property, except by the judgment of his peers, or the law of the land, does not apply to tax cases.—Cooley on Taxation, 36. Taxes are recoverable, not only without a jury, but without a judge; and the assessment of ministerial officers has been made to operate as an execution on the citizen. The sovereign can not wait the tedious process of getting a judgment. She clothes her collecting officers with the power to issue process, which will at once command her means.—11 Geo. 79; 47 Cal. 222; 6 T. B. Monroe, 641; Cooley on Taxation, 38. The State could make such a law as the ordinance assailed in the case; and having delegated to the city of Huntsville the power to collect taxes, it gave to that city the power to pass the ordinance here assailed.

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STONE, J.—The following propositions are settled by the numerous decisions of this court, as the result of our statutes :

First: That, upon the death of one seized of a heritable estate in lands, the title descends *eo instanti*, and vests in the heir at law, if there be no will giving it a different direction ; that with the title, there also passes to the heir at law the right to the possession and after-accruing rents and profits, subject to the statutory power of the personal representative to take possession and claim rents accruing, or to let to rent, or to obtain an order and sell, for the purposes of administration. This right of immediate possession is further qualified by the homestead rights of the widow and minor children, if there be such; by the quarantine rights of the widow; and, in case there be a plantation on which a crop has been commenced by decedent, a further limitation to the end of the year.—See Code of 1876, §§ 2562, 2238, and 2439 ; Constitution of 1875, Art. 10, §§ 3 and 5. With these exceptions, the title and right to the possession vest in the heir, as above stated.

Second : That the personal representative, subject to the homestead and quarantine rights as above stated, may claim and take possession, let to rent, or, in case of lands in the hands of a tenant, may give notice and claim rent, past due, or to accrue, and may obtain an order and sell, when a statutory ground exists, and thus confer on the purchaser the right to the possession, to the exclusion of the heir at law—all for the purposes of administration ; that to these ends he may successfully prosecute an action of ejectment against an intruder, and may likewise prosecute or defend successfully an action for the possession against the heir at law himself ; that a possession and control of the realty, thus taken by the personal representative, destroys or suspends the heir's right to the possession, and to rights of action which at common law descended with the land to him, as the possession may terminate in a sale and divestiture of the title, or with a temporary use, or letting to rent.

Third : That, to suspend or destroy the heir's right to the possession of the inheritance, the personal representative must actually take possession, or must assert his right, and follow it up with the means necessary to that end.—*Master-son v. Girard*, 10 Ala. 60 ; *Harkins v. Pope*, *Ib.* 493 ; *Martin v. Williams*, 18 Ala. 190 ; *Chighizola v. LeBaron*, 21 Ala. 406 ; *Smith v. Kyles*, 22 Ala. 558 ; *Branch Bank v. Fry*, 23 Ala. 770 ; *Golding v. Golding*, 24 Ala. 122 ; *Russell v. Erwin*, 41 Ala. 292 ; *McCullough v. Wise*, 57 Ala. 623.

It results from these well-settled principles, that the right
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of the personal representative to the possession, rents, income and profits of lands, of which decedent died seized, is one which he may or may not exercise ; and when he fails to assert it, the descent is not intercepted, and no stranger can gainsay or dispute the heir's possession, or right to the possession. We hold that certain consequences flow from these well-settled principles. The possession of the personal representative, which will work a dispossession of the heir, must be an actual possession ; a taking or claiming the control, use, occupation, or the rents, income, and profits of the premises. Less than this will not dispossess the heir, nor intercept the descent. There is no such thing as the right of the personal representative drawing to it the possession, by construction, or fiction of law. Only the title can do that, and the personal representative has no title. We hold, further, that when an estate has been administered, and the administration closed, all the rights of action for use and occupation of the land descended, not previously asserted and brought into the administration by the personal representative, remain in the heir or devisee, unimpaired and unaffected by the unexecuted power to possess, conferred by our statutes on the personal representative. We may go further, and hold that, pending administration, it is only the actual possession of the personal representative, or his asserted right thereto, followed up by proceedings to obtain possession, or his asserted right to the rents, income and profits, that can take away, or suspend, the right of the heir (or devisee) to prosecute a suit for the possession of lands descended or devised, or any other action which such heir (or devisee) could maintain by the rules of the common law. It requires action by the personal representative to divest the heir of his right to the inheritance, with all its common-law incidents ; and in the absence of action, effective action, the right remains with the heir.

Under these principles, we do not think Mr. Clay ever took or had such possession or control of the premises, as to suspend, or oust the possession of the heir. His attempt to let the house to rent failed for want of compliance, on the part of the proposed lessee, with the terms of the letting ; and he not only did not sell, but made no attempt to sell, under the order of court obtained for the purpose. These initiatory steps, as we have seen, do not amount to a taking of possession by the personal representative. The Circuit Court erred in not giving the first charge asked by plaintiff. The court should also have given charges numbered 5 and 6, as so asked.

Section 101 of the ordinances of the city of Huntsville,

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after providing for the sale of real estate, and certificate thereof, for the non-payment of taxes due the city, ordains as follows: "It is the duty of the collector to put the purchaser in possession of the premises sold to him, within thirty days after the execution of the certificate; and such certificate shall be evidence of a right to possess the premises therein specified, and to retain them until redeemed as provided by the charter; and if necessary, the mayor is authorized to direct the police to put the purchaser in possession. If the property is not redeemed within the time prescribed by the charter, the certificate shall operate as a deed of conveyance." This certificate, the form of which is given in the ordinance, recites the material facts necessary to authorize a sale for taxes, and recites the sale, purchase, and payment of the purchase-money. The certificate also states that the purchaser, having paid the purchase-money, "is entitled to the immediate possession." The point is made, that the charter of the city of Huntsville is not broad enough to authorize the extreme powers the ordinance confers on the collector, the mayor, and the police. The rule is, that powers, such as this, can only be exercised by corporations, when they are granted by clear expression in the charter.—*Boyd v. The State*, 61 Ala. 177. But there is a graver question, which renders a decision of this unnecessary.

In the Bill or Declaration of Rights, article I of our several constitutions, it is declared, that no person shall be deprived of his property, but by due course, or process of law. Constitution of 1819, § 10; of 1861, § 10; of 1865, § 7; of 1868, § 8; of 1875, § 7. The principle of this provision was adopted from *Magna Charta*. It is here urged, that the provisions of the ordinance copied above violate this fundamental principle of constitutional right, and are therefore inoperative. In our own case of *Dorman v. The State*, 34 Ala. 216, justly entitled to be classed as a great case—great alike in the profound research it displays, the clear logic of its conclusions, and the elegant diction in which it is expressed—this provision of the constitution came before this court for interpretation. It was there said: "The expressions, 'the law of the land,' 'due process of law,' and 'due course of law,' as found respectively in the English charters and in the various State constitutions in the United States, are substantially identical, and have always been held to mean a judicial proceeding regularly conducted in a court of justice, as contradistinguished from statutory enactment. . . . An act of the legislature is not, and nothing less than a regular judicial trial is, 'due course of law,' within the meaning of this clause of the constitution."

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It will be observed that, under the provisions of the ordinance copied above, the collector, without any judgment of a court, or judicial ascertainment of the facts, may put the purchaser in possession of lands sold for taxes, and, "if necessary"—that is, "if the tax-payer refuses to yield possession without force—the mayor is authorized to direct the police to put the purchaser in possession;" and the "certificate shall be evidence of a right to possess the premises therein specified, and to retain them until redeemed;" and "if the property is not redeemed within the time prescribed by the charter, the certificate shall operate as a deed of conveyance." To summarize: All the various and well-regarded processes by which taxes are levied and assessed, the fact that the tax-payer is in default, the unsuccessful inquiry and search for personal property, the due and legal advertisement and sale; all these disputable facts are proved by the collector's certificate. The purchaser is then put in possession by force (the certificate authorizes the force, and legalizes the purchaser's possession for two years, unless the property is sooner redeemed); and if not redeemed within the two years, the certificate operates as a deed of conveyance, and the title, as well as the seizin of the tax-payer, is gone forever, by mere legislative enactment, without the semblance of judicial proceedings.

An ordinance of the city of Selma provided, that a purchaser of lands at tax-collector's sale might recover possession, if withheld from him, by action of unlawful detainer before a justice of the peace. The case of *Ex parte Webb*, 58 Ala. 109, made it necessary to construe that ordinance. We said: "The proceeding by the purchaser at the tax-sale is founded on the theory, that he has acquired title by his purchase, and the title draws to it the possession. . . . Unless the party proceeded against is deprived of all right of defense, or his right of defense is narrowed and circumscribed, so that generally it would be valueless, there must, of necessity, be an inquiry into the estate, or merits of the title. . . . A legislative declaration, that the party withholding the possession is guilty of an unlawful detainer, and that suit for the recovery of possession, and damages for the detention, may be commenced before a justice of the peace, can not be so construed as, in effect, to disseize a man of his freehold, and convert his estate into a mere right of action." See, also, *Stoudenmire v. Brown*, 48 Ala. 699; *S. C.*, 57 Ala. 481; *Doe, ex dem. Davis v. Minge*, 56 Ala. 121.

In Cooley's Const. Lim. 363, it is said: "Forfeitures of rights and property can not be adjudged by legislative act; and confiscations, without a judicial hearing after due notice,

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would be void, as not being due process of law." And on page 368-9, the same standard author says: "In judicial investigations, the law of the land requires an opportunity for a trial; and there can be no trial, if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud, or a forgery; public officers may connive with rogues, to rob the citizen of his property; witnesses may testify, or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice, or of constitutional law. A statute, therefore, which should make a tax-deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property." And in *Cooley on Taxation*, 377, it is said: "It would be manifest and most gross injustice, to make lapse of time alone extinguish the owner's title. . . . And it seems to us very clear that, under such circumstances, it is not competent to limit a period, at the expiration of which the tax-title shall become a perfect title, and not open to controversy or dispute."—*Blackwell on Tax-Titles*, 449, in margin.

In *Burroughs on Taxation*, 336, it is said: "The doctrine is settled, that it is not in the power of the legislature, by mere legislative declaration, to divest the title of the owner." In *Denny v. Mattoon*, 2 Allen, 361, 378, the court employs the following language: "If, for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in the place of the well-settled rules of law the arbitrary will of the legislature, and thereby controlling the action of the tribunal before which the suits are pending; no one can doubt that it would be an unauthorized act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary."—See, also, *Richards v. Rate*, 68 Penn. St. 248; *State of Maine v. Doherty*, 60 Maine, 504; *Conway v. Cable*, 37 Ill. 82.

These principles and authorities are decisive of the question we are considering. The ordinance is but an act of legislation, and possesses none of the properties of a judicial proceeding. It is violative of the constitution, and therefore void, to the extent above pointed out; because it deprives the tax-payer of his property, without due course of law. The collector's certificate neither authorized Fletcher to take possession without the owner's consent, nor did it authorize

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the collector to put him in possession of the property, thus in possession of Miss Calhoun by her agent or servant. The Circuit Court erred in giving the 12th clause of the general charge to the jury, and in refusing to give charge requested by plaintiff number 2. Charges numbered 7 and 8 are probably a little too broad. They ask that the whole ordinance (No. 101) be pronounced unconstitutional. Many of its provisions are free from constitutional objection.

We consider it unnecessary to decide any other questions raised by the record.

Reversed and remanded.

Planters' and Merchants' Mutual Insurance Company v. Selma Savings Bank.

Bill in Equity to compel Transfer of Stock on Books of Private Corporation.

1. *Transfer of stock in private corporation, and lien of corporation on stock.* The by-laws of an incorporated savings-bank, passed in the exercise of its corporate powers, requiring transfers of stock to be entered on its books in the presence of its president or secretary, and declaring a lien in favor of the bank on the stock of any shareholder who is indebted to it, not only on account of his unpaid stock, but also for all other debts and liabilities whatever, are intended for the protection and security of the bank, and of third persons who may in good faith acquire stock without notice of prior equitable transfers; but, while the legal title to stock can only be acquired by a transfer made in the mode prescribed, a complete equitable title may be otherwise acquired, entitling the transferee to demand that he be invested with the legal title.

2. *Same; stock held by partnership.*—On the dissolution of a partnership owning stock in such savings-bank, the retiring partner selling out his interest to the others, and the latter assuming all the debts of the partnership, and continuing the business under a new name; the new firm, as the successor of the old, becomes the equitable owner of the stock; and the bank's lien on the stock covers the liabilities of the new firm, in its subsequent transactions with the bank, and must prevail over the claim of an equitable assignee of the retiring partner.

3. *Same; estoppel in pais.*—No estoppel can arise against the bank, in such case, from a letter written by its cashier to the old firm, or to the retiring partner, stating that there was no lien or incumbrance on the stock in favor of the bank; the letter containing no intentional misrepresentation, and being written more than twelve months before any interest in the stock was acquired by the equitable assignee.

4. *Demurrer; specification of grounds.*—A demurrer to a bill in equity must set forth specially the causes or grounds of demurrer (Code, § 3748), and the court can not consider any other ground not specifically assigned.

5. *Supplemental and amended bills; facts occurring after filing of bill.*—Supplemental matter, supporting the complainant's right to the relief prayed by the original bill, may be introduced by amendment, without filing a supplemental

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bill (48th Rule of Chancery Practice); but, if the original bill does not make out a case for relief, facts subsequently occurring, no matter how introduced, can not avail the complainant.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. CHARLES TURNER.

The original bill in this case was filed on the 19th July, 1877, by the appellant, a domestic corporation, located and doing business in Mobile, against the Selma Savings Bank, also a domestic corporation, located and doing business in Selma; and sought to compel the defendant to transfer on its books two certificates of stock, of which the complainant claimed to be the owner and holder for valuable consideration, and which the defendant, or its officers, refused to transfer on demand before the filing of the bill. The certificates of stock, which were copied at length in the bill, were in favor of H. A. Stollenwerck & Brothers, and purported to be "transferrable only on the books of the company, by them or their attorney, on surrender of this certificate;" and on each was an indorsement, signed by said H. A. Stollenwerck & Brothers, appointing "W. White, cashier," their attorney irrevocably "to sell and transfer to the Planters' & Merchants' Mutual Insurance Company of Mobile the whole or any part of the within named shares," &c. The bill alleged that these certificates "were assigned and delivered to complainant by F. E. Stollenwerck, who was a member of said firm of H. A. Stollenwerck & Brothers, in the ordinary course of business, for a present consideration, of value fully equal to the value of said stock, the said consideration being given to said Stollenwerck by complainant at the time of the receipt of said certificates." It alleged, also, "that at the time said stock was offered to be sold and transferred to complainant, as above set forth, special inquiry was made by complainant's agents and officers, of said Stollenwerck, as to whether or not there was any lien held by said bank on said stock; and complainant was then and there assured by said Stollenwerck that there was no lien on said stock in favor of said bank, and that he had in his possession an official communication from the cashier of said bank, certifying to the fact that the bank had no lien or claim on the stock; and complainant alleges that a communication to that effect was in fact written by said cashier to said Stollenwerck & Brothers, and was written for the purpose of enabling them to transfer said stock; and that the same was communicated to complainant, and upon the faith of the same complainant traded for the said stock, giving full value therefor." It was alleged, also, that in March, 1877, the complainant requested and demanded the defendant to transfer these shares of stock

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on its books to the complainant; that the defendant, through its officers, refused to make such transfer, and claimed to hold a lien on the stock, but refused to give the complainant any information as to the nature or extent of its lien; and the bill alleged, on information and belief, that the defendant did "not in fact hold any contract, obligation, or debt, which in law gives it a lien on said shares of stock." The prayer of the bill was, that the defendant might be compelled to transfer the shares of stock on its books to the complainant, and for general relief.

The defendant answered the bill, denying the complainant's ownership of the stock, and asserting a lien on it, under its by-laws, for debts due to it from said H. A. Stollenwerck & Brothers, and its successors in business, Stollenwerck & Brother, and F. E. Stollenwerck & Brother; which lien, it alleged, accrued under these circumstances: The firm of H. A. Stollenwerck & Brothers, in whose name the certificates of stock were issued, was composed of three brothers, H. A. Stollenwerck, F. E. Stollenwerck, and A. G. Stollenwerck; and this firm was dissolved, on or about the 1st September, 1876, by the withdrawal of H. A. Stollenwerck, who transferred all his interest in the business and assets of the partnership to the other members, who assumed all the debts and liabilities of the partnership, and continued business under the firm name of F. E. Stollenwerck & Brother, and afterwards of Stollenwerck Brothers. At the time of H. A. Stollenwerck's withdrawal from the partnership, it was indebted to the defendant in the sum of about \$20,000; and of this amount, the answer alleged, about \$12,000 was still due at the filing of the bill; the evidences of indebtedness being renewed from time to time, as they matured, and changed in form in the subsequent dealings between the new firms and the defendant; and for this entire indebtedness the defendant claimed a lien on said stock, under the provisions of its by-laws, which were set out in the answer, and which are also copied in the opinion of the court. The answer further alleged that, when the complainant obtained the certificates of stock, the blanks in the indorsed power of attorney, for the names of the attorney and of the transferee, had not been filled up; that the defendant had no notice of any interest in the stock on the part of the complainant until on the 20th March, 1877, after Stollenwerck & Brother had failed, when a letter was received from the complainant asking and demanding to have it transferred on the defendant's books; that the indorsements were not filled up until after that day; and that the complainant's subsequent demand for information, as to the amount, nature and extent of the de-

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fendant's lien, was refused, because the complainant had then employed counsel to bring this suit, and desired the information for that purpose. As to the letter alleged to have been written by the defendant's cashier, the answer denied the authority of the cashier to write such a letter; denied that the complainant had any right to act, or had in fact acted, on the letter; and denied that any liability against it could be created by the letter, if any such was written.

The evidence showed that the certificates of stock, after the dissolution of H. A. Stollenwerck & Brothers, were treated by all the partners as the property of the firm, and were transferred to the complainant by F. E. Stollenwerck, on the 26th December, 1876, as collateral security, or in exchange for other collateral security, held by complainant against Stollenwerck & Brother; and the blanks in the indorsement were not filled up until about the time when the bill was filed. The letter of the defendant's cashier, mentioned in the bill, was not produced, and was said to have been lost; but one of the witnesses, who was the book-keeper of the Stollenwerck brothers, testified in relation to it: "My belief has always been, that Mr. Stollenwerck sent it to New York, with some other certificates of Selma Savings Bank stock, which he hypothecated there. The purport of said letter was, that the said bank had no lien whatever on said stock. It was addressed to F. E. Stollenwerck & Brother, and stated that the bank had no lien whatever upon the stock." F. E. Stollenwerck thus testified in reference to it: "At the time I handed said certificates to Mr. Lathrop," the complainant's secretary, "he asked me if the bank had any lien on them. I replied, that I had written to my firm in Selma, some time before, asking them to get a letter from the cashier of the bank, stating whether or not the bank had a lien upon its stock; and that I received, in response, a letter from Mr. White, cashier, addressed either to H. A. Stollenwerck & Brothers, or to F. E. Stollenwerck & Brother, in which he stated that the bank had no lien on its stock. The letter was not exhibited to Mr. Lathrop then, nor upon any other occasion. . . . It was a short letter, and its contents were to the effect that the bank held no lien upon its stock." On the part of the defendant it was proved that said White, the writer of said letter, was the defendant's secretary, only from the 1st January, to the 15th September, 1875.

At the hearing, the complainant asked leave to file an amended bill, alleging that, since the filing of the original bill, the defendant had received the proceeds of sale of valuable property, held by it as collateral security for the debts

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due from the Stollenwercks, leaving but a small balance, if any, of the indebtedness of the old firm still due and unpaid; offering to pay this balance, as ascertained on an accounting under the order of the court; and adding to the prayer of the bill the following words: "Orator prays, in case it should appear there is due from said H. A. Stollenwerck & Brothers, in whose name said stock stands, any debt which constitutes a lien on said stock, that an accounting may be taken ascertaining the amount thereof, and charging the defendant with the value of the property and money received thereon; and that orator may be allowed to pay the same, and thereupon have the stock transferred and assigned on the books of the company to your orator." The defendant demurred to the amended bill, assigning the following as causes of demurrer: 1st, "that if the complainant was not entitled to relief when the original bill was filed, complainant can not become entitled to relief by events occurring after the bill was filed;" 2d, "because the complainant is not entitled to relief against this defendant on account of payments made after the commencement of this suit;" 3d, "because the complainant can not maintain the equity of its bill by events occurring after the original bill was filed." The chancellor overruled the demurrer, and allowed the amended bill to be filed; but, on final hearing, on pleadings and proof, he held the demurrer to be well taken, and dismissed the amended bill, and also the original bill. From this decree the complainant appeals, and here assigns as error the sustaining of the demurrer to the amended bill, and the final decree dismissing the original bill.

LAPSLEY & NELSON, for appellant.—1. The amended bill alleged, that all the debts of H. A. Stollenwerck & Brothers, in whose name the stock stood on the defendant's books, had been paid, or nearly paid; and offered to pay the balance, if it was adjudged a lien. This was a substantive allegation, having no connection with what followed, but rather supplementary to the matter of the original bill, which alleged that the defendant did not hold any debt which was a lien. This part of the amendment was not demurred to, and the court had no right thus to pass on it, being confined to the consideration of the causes of demurrer specially assigned. Code, § 3784; *Ray's Adm'r v. Womble*, 56 Ala. 36; *Chambers v. Wright*, 52 Ala. 444; also, *Johnson v. Culbreath*, 19 Ala. 348. Note, too, these facts are not alleged as ground of relief, but are prayed to be taken into the account, and charged to the defendant at the true value of the property received and appropriated. As to any repugnancy between the amendment

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and the original bill, no question can arise, because none is raised by the demurrer. To make an amendment of the bill improper, there must be an inconsistency, or repugnancy, between its purpose and that of the original bill—a mere inconsistency between the allegations of the two bills is not enough.—*Ingraham v. Foster*, 31 Ala. 132; *King v. Avery*, 37 Ala. 169. The purpose of each of the bills, as expressed in the prayer, is identical—that the court will decree a transfer of the stock on the books of the defendant. A sufficient excuse for not making a tender, or offer to pay the balance due, if any, before suit was brought, is shown, and the offer in the bill is sufficient.—*Gunn v. Brantley*, 21 Ala. 632; *Cain v. Gimon*, 36 Ala. 168.

2. That the complainant, as the legal owner and holder of the stock, had a right to file a bill for an account, and to redeem the property from the lien, irrespective of its amount or extent, can not be disputed, and requires no citation of authorities. But the evidence shows that, on the 26th December, 1876, when the complainant acquired the stock from F. E. Stollenwerck, all the debts contracted with the defendant by H. A. Stollenwerck & Brothers had been paid, or cancelled and discharged, and new obligations given and accepted in their stead; and that the defendant then held no paper or obligation with the name of H. A. Stollenwerck & Brothers upon it, as makers, indorsers, acceptors, or otherwise. It was natural, and in accordance with general commercial usage, that the creditor should prefer the paper of the new and active firm, which could be used for all the purposes of business, to that of the defunct partnership; but the change and substitution necessarily discharged, and was intended to discharge, the old firm from its liability.—*Parsons on Partnership*, 421-2; *Arnold v. Camp*, 12 Johns. 409; *Muir v. Cross*, 10 B. Mon. 277; *Collyer on Partnership*, § 909; *Evans v. Drummond*, 4 Esp. 89; *Reid v. White*, 5 Esp. 122; *Thompson v. Percival*, 5 Barn. & Ad. 925; *Kirwan v. Kirwan*, 2 Cr. & Mees. 617; 2 Dan. Neg. Ins. § 1268. If it be said, that the creditor can not be presumed to have discharged a lien; the answer is, that the defendant did not then claim a lien, and did not believe it had any lien.

3. The right of the defendant to retain the stock, under its by-laws, for the debts of the new firms, was not contended for in the argument before the chancellor. The lien extends only to debts due by him in whose name the stock stands on the books of the company, he being the real owner.—*Helm v. Swigett*, 12 Indiana, 195, and cases cited. These secret liens, it is suggested, are opposed to the whole policy of the registration statutes, which are intended for the protection of in-

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nocent purchasers, and they should not be extended by construction.

4. The complainant traded for the stock on the faith of the letter written by the defendant's cashier, which contained an express assurance that the stock was clear of any lien. It was not necessary that the letter should have been addressed to the complainant, or even exhibited to it. *Smith & Ferguson v. Ledyard, Goldthwaite & Co.*, 49 Ala. 279.

BROOKS & ROY, and PETTUS, DAWSON & TILLMAN, *contra*.

1. There was no alternative averment, in either the original or the amended bill, on which to base the alternative relief prayed in the latter; and the granting of that relief would not only have been in the absence of appropriate allegations, but in actual contravention of the case made by the bill. *Rives, Battle & Co. v. Walthall*, 38 Ala. 333; 2 Paige, 396. Again, it is well settled, that relief can not be granted on events which occurred after the filing of the bill.—38 Ala. 334; *Land v. Cowan*, 19 Ala. 238; *Hill v. Hill*, 10 Ala. 527.

2. At common law, a banker has a general lien on all the securities of his customers, for the balance due him.—*Davis v. Bowsher*, 5 Term R. 247, mar. 488; 6 Man. & Gr. 630; 33 L. J. C. 51. By virtue of statutes, charters, and by-laws passed in pursuance thereof, this lien is now given to most private corporations, for debts due from their stockholders. It is not necessary that the lien should be expressly declared by statute, or by the charter; it is sufficient that it is declared by by-laws, passed in pursuance of authority conferred by the charter.—Code, §§ 2040-44. By the charter and by-laws of the defendant in this case, a lien is expressly given for the debts due to it from H. A. Stollenwerck & Brothers, to whom the certificates of stock were issued; and this lien extends to the debts and liabilities of the successive firms, and of the three partners who composed each of those firms.—*Mobile Mutual Ins. Co. v. Cullom*, 49 Ala. 562; *Cunningham v. Ala. Life Ins. and Trust Co.*, 4 Ala. 652; *Stebbins v. Phoenix Ins. Co.*, 3 Paige, 350; *Union Bank v. Laird*, 2 Wheaton, 390; *Abbott's Dig. Corp.* 757; 3 Kernan, 599; 24 N. Y. 283; 10 Peters, 596.

3. No estoppel can arise against the defendant, from the letter said to have been written by White, its cashier; because, in the first place, its contents are not satisfactorily proved. One witness says, its statement was that "the bank had no lien on *said* stock;" while F. E. Stollenwerck, who made the transfer of the stock, and on whose representation the complainant claims to have relied, testifies that its language was that "the bank had no lien on *its* stock,"—evi-

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dently, the mere expression of the writer's opinion as to the construction of the by-laws. Again, it is not shown that the letter was written while White was the defendant's cashier; and if written during that time, it was not within the scope of his duties or authority, and the defendant is not bound by it.—Story on Agency, § 115; 14 Mass. 58; 17 Mass. 28, 504; 21 Howard, 356-64; 6 Peters, 51; 8 Peters, 12; 8 Ala. 340; 18 Ala. 479. Moreover, the letter was not acted on, and therefore is wanting in one of the essential elements of an estoppel: it was not produced, nor called for, and the transaction was not based on it.—*Pounds v. Richards*, 21 Ala. 424; *Ware v. Cowles*, 24 Ala. 446; *Gamble v. Gamble*, 11 Ala. 966; *Miller v. Hampton*, 37 Ala. 342.

BRICKELL, C. J.—The principal questions presented by the original bill are—first, whether the appellee has a lien on the stock standing on its books in the name of H. A. Stollenwerck & Brothers, for debts due and owing it, from the said firm or its successor, having an equitable title to the stock; second, whether there are found in the case facts and circumstances, which render it inequitable to assert the lien against the appellant.

The by-laws of the bank, passed in the exercise of its corporate powers, regulate the mode of transferring stock, and define the rights and liabilities of transferrer and transferee, and the rights of the bank in the event of transfer. The ninth of these by-laws is in these words: "All transfers of stock shall be made in a book kept at the office of the company, in the presence of the president or secretary; and no new certificate of stock shall be issued, until the old is surrendered, except in case of loss." The fifteenth reads: "Any stockholder, who has paid up his stock note in full, and is not otherwise indebted or liable to the company, may transfer his stock at any time, upon the surrender of his certificate." The sixteenth reads: "Stockholders who have not paid up their stock in full, or who may be otherwise indebted to the company, shall not transfer their stock on the books of the company, until the person to whom such transfer is proposed to be made, shall give to the company notes, with satisfactory security, to be approved by the president, for the amount due on such stock note, or other liability. When such stock note and security are given, the stock may be transferred, and all evidence of debt or other liability surrendered to the stockholder transferring the stock."

The point of contention is not that these by-laws, though not in terms so expressed, are not the equivalent of an immediate, clear reservation by the bank of a lien—a right to

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retain and hold for its own indemnity, security and protection, the stock of every shareholder, not only for the payment of the debt which may have been contracted in the acquisition of the stock, but of any other debt, whether it is in the relation of principal or surety, or of indorser, or guarantor, which the bank had the power and the shareholder had the capacity to create. The point of contention is, that the lien, the right of the bank to hold and retain, extends only to the debts or liabilities of the nominal shareholder, and does not embrace new debts, of which these are the consideration, or other debts, contracted by the equitable owners of the stock known by the bank to be such owners. This is reducing the controversy to the analysis most favorable to the appellant, without discussing or considering other questions, which might arise, if the bank was seeking to fix a liability on parties whose names do not appear on the paper it now holds, and as a security for which it claims a lien.

The mode of transferring stock provided by the by-laws, is intended for the protection and security of the bank, or of third persons who in good faith, on a valuable consideration, may in that mode acquire the stock, without notice of prior equitable transfers, or of outstanding equities. The legal title to the stock cannot pass, unless this mode of transfer is observed. But a complete equitable title may be acquired by a transfer in any form or manner appropriate to pass property of that kind, divesting the stockholder of all right and interest, and entitling the transferee to demand that he be invested with the legal title.—*Duke v. Calawba Navigation Co.*, 10 Ala. 82; *Black v. Zacharie*, 3 How. (U. S.) 483. On the dissolution of the firm of H. A. Stollenwerck & Brothers, who were then the legal and equitable owners of the stock, and in whose name it stood upon the books of the bank, the stock, with all other partnership assets and property, was transferred to the succeeding firm of F. E. Stollenwerck & Brother, or of Stollenwerck Brothers, which assumed, and were bound to pay, all the debts of the dissolved partnership. Thereby, the new firm became the equitable owners of the stock, of which the bank had notice. It may be admitted, that, when the transfer of the stock was made to the appellant, there were no debts of H. A. Stollenwerck & Brothers, remaining in the same form as when that partnership was dissolved; and it may be from all such debts that partnership was discharged by the subsequent transactions between the bank and the succeeding firm. But the succeeding firm, the equitable owners of the stock, were indebted to the bank; and it is as a security for the payment of such debts the bank claims a lien. The lien created by

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the by-laws, for the security of the bank, extends not only to stock of which the stockholder may have the legal title, but to all of which he is the real, beneficial owner, though the legal title may reside in another. The lien would not be available against a *bona fide* purchaser, who, without notice of it, upon a valuable consideration, might acquire the legal title. But, as against the stockholder, and all who merely succeed to his rights and equities, the lien must prevail. *Stebbins v. Phoenix Ins. Co.*, 3 Paige, 350. It is intended as a security to the bank—a security to which, in equity and good conscience, it is entitled, for all debts which may have been contracted on the faith of it. Credit may be, and is doubtless, often extended to the real, beneficial owner, on the faith of the stock, and in reliance upon it as a security. We can perceive no good reason, and we are not aware of any authority requiring it, to limit the lien to debts owing the bank by the holder of the legal title only, excluding such as may be due from the owner of the complete equitable title. It is not, therefore, a material inquiry, whether the debts due the bank are to be regarded as in any sense the debts of H. A. Stollenwerck & Brother, in whom the nominal and legal title to the stock resides, or as the debts solely and exclusively of the succeeding firms, in whom the beneficial ownership resides.

3. The estoppel of the bank to assert, as against the appellant, a lien on the stock, is supposed to arise from statements made in a letter, said to have been written by its cashier, in 1875, addressed either to the firm of Stollenwerck & Brother, or to one of its members, F. E. Stollenwerck. The letter is lost, or mislaid, and from the secondary evidence introduced, it is difficult, if not impossible, to ascertain its contents with any degree of certainty. It is consistent with the evidence, that the letter contained no more than an expression of the opinion of the cashier, that the bank had not, as matter of right, or of law, a lien on the stock of its stockholders, for debts owing, or liabilities incurred to it. If the letter contained no more than this, intentional misrepresentation, to influence the conduct of the appellant, not being imputable, there would be in it no element of estoppel. *Townsend v. Cowles*, 31 Ala. 428. But, suppose it was the distinct affirmation of the fact, that at the time it was written there was no lien or incumbrance in favor of the bank on this particular stock; it was the affirmation of a present existing fact only, and not a representation or guaranty that the fact would continue to exist. It was more than twelve months after the writing of the letter, before the appellant entered into the transaction, which it now declares was influenced by

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it. It must have occurred to the officers of appellant that, while it may have been true, when the letter was written, that there was no lien or incumbrance on the stock, the fact was not in its nature continuing—that, in the ordinary transactions of business, it might be a fact on one day, and not weeks, months, or a year thereafter. The appellant had no right to rely on the statements of this letter, as a representation of the rights of the bank months after it was written.

4-5. Under the statute (Code of 1876, § 3784), a demurrer to a bill in equity must set forth the ground of demurrer specially; otherwise, it cannot be heard. The attention of the court is confined to the particular cause assigned; and though there may be other good and sufficient causes apparent, the demurrer must be sustained only on the cause particularly assigned. The single ground of demurrer assigned to the amended bill, is, that it founds the claim to the relief thereby prayed on facts which occurred after the filing of the original bill. Whether it does not entirely abandon the case made by the original bill, and introduce a new and different case, making really a new bill, is not a matter the demurrer presents. Under our practice, supplemental matter, by which we mean new facts occurring since the filing of the original bill, supporting the right of the complainant to the relief thereby prayed, may be introduced by way of amendment—there is no necessity for resorting to a supplemental bill.—Rule 48 of Chancery Practice. But, upon facts occurring subsequent to the filing of the original bill, the complainant cannot obtain relief, no matter how introduced, whether by amended or supplemental bill, if on the original bill relief could not be had.—*Hill v. Hill*, 10 Ala. 527; *Land v. Cowan*, 19 Ala. 297; *Vaughn v. Vaughn*, 30 Ala. 329. The amended bill, admitting the right of the bank to retain and hold the stock as a security for the debts due to it from the beneficial owners, claims to be let in to redeem, holding the bank to account for, and apply collaterals it has, since the filing of the original bill, received, and disposed of in some way. If, upon these facts, the complainant could obtain relief, not being entitled to any on the original bill, and certainly not to relief of this character, the amended bill would be converted into a new original bill, and relief granted upon rights having no existence at the commencement of the suit.

We find no error in the decree of the chancellor, and it is affirmed.

[Drake v. Webb, adm'r. &c.]

Drake v. Webb, adm'r, &c.*Action on Supersedeas Bond.*

1. *Special supersedeas bond; what damages are recoverable.*—On appeal from a decree in chancery, which ordered a fund in court to be distributed equally among five claimants, two of whom claimed the whole fund; a special *supersedeas* bond being required by the chancellor (Code § 3928), from any claimant who desired to appeal, conditioned to “prosecute the appeal to effect, and pay such costs and damages as the other parties to the cause may sustain by reason of such appeal, if the said decree is affirmed; the decree being affirmed, and an action at law brought on the bond; held, that the plaintiff was entitled to recover, as damages, interest on his proportionate part of the money in the hands of the register, during the pendency of the appeal, and a reasonable attorney’s fee for services rendered on the appeal.

APPEAL from the Circuit Court of Hale.

Tried before the Hon. GEO. H. CRAIG.

This action was brought by James E. Webb, as the administrator of the estate of Lucy Sheppard, deceased, against William H. Drake, John R. Webster, and James W. McCrary; was commenced on the 27th August, 1878; and was founded on a penal bond executed by the defendants, dated the 7th March, 1877, payable to Joseph Hodgson, register in chancery at Mobile, and conditioned as follows: “Whereas the above-bounden William H. Drake has this day applied for and obtained an appeal, returnable to the next term of the Supreme Court of Alabama, to supersede and reverse a decree rendered on the 10th day of February, 1877, by the said Chancery Court at Mobile, in the case of *John H. Stone et al. v. Knickerbocker Insurance Company et al.* (being cause No. 3354 on the docket of said Chancery Court), against the said William H. Drake, Knickerbocker Life Insurance Company; *et al.*, at the January term of said court, 1877: Now, if the said William H. Drake shall prosecute said appeal to effect, and pay such costs and damages as the other parties to the cause may suffer by reason of such appeal, if the decree of the said Chancery Court is affirmed, then this obligation to be null and void,” &c. The complaint alleged, as a breach of this bond, that the appeal was not prosecuted to effect, but the decree of said Chancery Court was in all things affirmed by the appellate court, and that said Drake had not paid such damages as the other parties to the cause suffered by reason of such appeal; and the damages specially claimed by the plaintiff were thus stated: “Plaintiff avers

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that he, as such administrator, was a party to said cause in said Chancery Court, and has suffered damages by reason of said appeal, in this: that he was entitled by the decree of said court to the use of one-fifth of \$5,881.46, to-wit: the sum of \$1,176.29, which was paid into said Chancery Court by said Knickerbocker Life Insurance Company on the 20th February, 1877, and of the use of which he was deprived by the suing out of said appeal and superseding said decree, to-wit, from the 16th day of March, 1877, until the affirmance of said decree by the Supreme Court, to-wit, on the 15th June, 1878; and plaintiff now sues to recover the interest on said sum of \$1,176.29, from said 15th March, 1877, to said 15th June, 1878, to-wit, \$117.62, as a part of his said damages for the breach of the condition of said bond. And plaintiff avers, further, that he was damaged by the suing out of said appeal, in this, to-wit, in the sum of \$100, for attorney's fees incurred and paid in the defense of said appeal in said Supreme Court. All of which damages the said Drake has failed and refused to pay," &c.

In the case in which said chancery decree was rendered, the bill was filed by John H. Stone and others, as creditors of William B. Drake, deceased, against the widow, heirs-at-law, and distributees of said decedent, and against the Knickerbocker Life Insurance Company; and sought to reach and subject to the satisfaction of the complainants' debts the amount due on a policy of insurance for \$10,000, which the decedent had effected on his own life, in the Knickerbocker Life Insurance Company, "for the benefit of his wife, Catharine G. Drake, and her children by the assured." The insurance company did not deny its liability, and the claims of the creditors were compromised and paid; but a controversy arose between the several heirs and distributees, as to their respective interests in the residue of the fund, which was \$5,881.46. At the time the policy was effected, said William B. Drake had five children living; but only two of them survived him, one of whom was said William H. Drake; and said William H. claimed that he and his only living sister were entitled to the whole of the fund, to the exclusion of the personal representatives of those who died before their father. The chancellor held that each one of the children was entitled to one-fifth of the fund, which was ordered to be paid into court, and he rendered a decree in their favor accordingly; James E. Webb, as the administrator of the estate of Lucy Sheppard, a deceased daughter, being held entitled to one-fifth. The decree also provided: "Any of the parties adjudged to be beneficiaries of the said policy in the Knickerbocker Insurance Company, desiring to appeal from

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the decree rendered in this cause, may supersede the distribution of the fund among such beneficiaries, by giving an appeal bond as provided by law, in the sum of \$2,000; but such appeal shall not supersede the orders of this court requiring the payment of said fund into court, nor the costs, nor the payment of the amount decreed to the complainants. Such bond shall be payable to the register of this court, and be approved by him, and must be conditioned to pay such costs and damages as the other parties to the cause may suffer by reason of such appeal, if the decree of this court is affirmed." From this decree William H. Drake appealed, and executed the *supersedeas* bond on which this action is founded. The chancellor's decree was affirmed by this court on the 15th June, 1878, but the case has never been reported. The costs of the appeal were afterwards paid by Drake, and the money in the hands of the register was paid to Webb, as directed by the decree; and this action was then brought to recover the damages specially claimed, as above stated.

Under the rulings of the court on the pleadings and evidence, and in the charges given and refused, the plaintiff had a verdict and judgment for \$228.50, the aggregate of the two items specially claimed; and these several rulings, to which exceptions were duly reserved by the defendants, are now assigned as error.

THOS. R. ROULHAC, for appellant.

JAS. E. WEBB, *contra*.

STONE, J.—In *Hughes v. Hatchett*, 55 Ala. 539, and in *Steele v. Tutwiler*, at the present term, we considered, to some extent, the question of the proper condition of a *supersedeas* bond in cases of appeal falling within section 3928 of the Code of 1876. The rules we there declared were followed in granting the appeal out of which this action grew. The condition of the present bond is, to "prosecute the appeal to effect, and pay such cost and damages as the other parties to the cause may sustain by reason of such appeal, if the decree of said Chancery Court is affirmed." The chancellor had directed the amount and condition of the appeal bond, as required by the statute. The chancery decree appealed from, ordered the fund in litigation to be placed in the hands of the register, and a certain part of it to be paid to Webb, the plaintiff in this suit. In consequence of the appeal and *supersedeas*, that fund lay idle and unproductive in the hands of the register, until the decree of the chancellor was affirmed in this court; a delay of fifteen months. It was admitted,

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on the trial of this case, that a reasonable attorney's fee for defending against said appeal in this court is one hundred dollars. The recovery in this case is the sum of the interest which accrued on the fund ordered to be paid to Webb, while its payment was suspended by the *supersedeas*, and the attorney's fees for defending against the appeal. It seems to us that these damages are the direct, immediate, proximate result of the appeal and *supersedeas*, and that they fall directly within the purview of the bond. These are damages caused by the appeal, and the decree of the Chancery Court was affirmed in this court.

It is contended for appellant, that the condition of the *supersedeas* bond required in this case, and the recovery upon it, are violative of the statute which declares, that an appeal lies to the Supreme Court, as matter of right, from any final judgment or decree of the Chancery, Circuit or Probate Court, &c.—Code of 1876, § 3916. The appellate jurisdiction of this court is defined in article 6, section 2, of the constitution, in the following language: "Except in cases otherwise directed in the constitution, the Supreme Court shall have appellate jurisdiction only, under such restrictions and regulations, not repugnant to this constitution, as may from time to time be prescribed by law." The legislature, then, may regulate this right of appeal, and, to some extent, may restrict it. One regulation, imposed by the legislature, is, that in all appeals in civil causes, with exceptions in favor of certain persons unable to give bonds, the appellant must give security for the costs of appeal.—Code, § 3950. Security for costs does not supersede the judgment. Sections 3927 and 3928 of the Code declare in what manner *supersedeas* of judgments may be obtained, when appeals are taken to this court. The first of the named sections provides for money judgments, the collection of which is suspended by the *supersedeas* bond. When the judgment is affirmed, on appeal taken under this section, the law declares what the judgment shall be. The surety, by the judgment of this court, becomes bound with the appellant for the amount of the judgment the *supersedeas* bond suspended. This is within the very letter of his bond, which binds him "to satisfy such judgment as the Supreme Court may render in the premises." It also binds him to pay the statutory damages on affirmance, and the costs of appeal; for these are a part of the judgment rendered by this court. All these results are provided for, by the very terms of the statute, which prescribes the measure of liability and recovery.

When, however, the decree or judgment is for something other than the payment of money, then the bond provided

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for by section 3927 is not in the condition to meet the wants of the case, if a *supersedeas* is desired. In such cases, this court can not render a judgment, binding the surety to obey or perform the judgment or decree, or to pay any damages on the affirmance. The judgment or decree furnishes no criterion or standard for the imposition of damages; and the statutes have not authorized this court to adjudge damages in such a case. The most we can do is to affirm, and adjudge costs of appeal; the latter against the appellant and his surety. Hence, in such cases, there is a necessity that the *supersedeas* bond shall contain other conditions, varied according to the nature of the judgment or decree appealed from. The judge or chancellor presiding, or the register, must fix the amount and condition of the appeal bond in these cases.—Code, § 3928. Both the amount and the condition should be adapted to the nature of the decree or judgment appealed from, and the damages which may result from the suspension. The appellee should be made secure, but no unreasonable terms should be exacted.

We find nothing in the condition of the present bond which we consider unreasonable. The damages imposed are not a tax, or clog, placed on the appellant's right of appeal. That he could have had without a *supersedeas* bond, on giving security for costs of appeal. Such security for costs would have imposed on his surety no other liability than to pay the costs of appeal, if unsuccessful. This is a mere regulation of the right of appeal, for the security of the officers of court. But, when an aggrieved suitor desires to go further, and suspend the execution of a judgment or decree rendered against him, this is not simply a question of the right of appeal. It goes much beyond that. Very great damage may result from the appeal and the suspension. The condition of a bond, entailing these consequences, should be so adjusted and prescribed, as to secure the appellee against all loss or damage that may result proximately from the appeal and *supersedeas*. Attorney's fees are proximate damages, cast on the appellee by the appeal, and are, therefore, within the condition of the bond. We are not able to distinguish, in principle, between this question and the kindred one which arises in suits on injunction and detinue bonds.

The case of *Jenkins v. Hay*, 28 Md. 547, was very like this, in every material feature. The court said: "Under this bond, the plaintiffs are not confined to the recovery of costs in the appellate court, and loss of interest, but may recover for any further loss or injury which they can show proceeded from the suspension of the decree, caused by the filing of the

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bond." On the question of the right to recover attorney's fees, see *Ferguson v. Baber*, 24 Ala. 402; *Burton v. Smith*, 49 Ala. 293; *Seay v. Greenwood*, 21 Ala. 491; *Metcalf v. Young*, 43 Ala. 643; *Mills v. Long*, 58 Ala. 458; *Higgins v. Mansfield*, 62 Ala. 267.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

Memphis and Charleston Railroad Company v. Maples.

Action by Railroad Company on Bond of Agent.

1. *Proof of account from book-entries.*—A witness, testifying to the correctness of an account, may aid his memory by consulting the entries in books, when he himself made them, and had knowledge of their correctness when he made them; but he can not testify to the correctness of an account, as made out from books in his custody and possession, when he did not himself make the entries, and has no knowledge of the matters of account except as derived from the books.

2. *Deposition; when motion to suppress may or must be made.*—A motion to suppress a deposition, or a portion thereof, for defects or causes which may be remedied on a re-examination of the witness, must be made before the trial is begun; but illegal evidence may be suppressed and excluded at any stage of the cause, when it does not appear that it could be rendered legal on a re-examination of the witness.

3. *Proof of account.*—An account is not documentary evidence, nor governed by the rules which apply to primary and secondary evidence.

4. *Rules and instructions to railroad agents; relevancy as evidence on question of agent's default.*—In an action by a railroad company, against the sureties on a bond given by one of its depot-agents, to recover for an alleged default of their principal for money received and not accounted for, the instructions given by the company to such agents, requiring them to make monthly reports, are not relevant or competent evidence for the plaintiff, when it does not appear that the alleged default is shown by the monthly reports of the agent, nor that he violated his duty in failing to make such reports.

5. *Deposition taken de bene esse; when suppressed.*—When the deposition of a witness is taken, on the statutory ground that the defense, or a material part thereof, depends exclusively on his testimony (Code, §§ 3063, 3078), and is offered in evidence on the trial by the plaintiff, it will be suppressed, on motion, if the witness is shown to be alive, and to reside within the county where the court is held.

6. *Agent's admissions; admissibility against principal or his sureties.*—The admission of an agent, not made at the time of doing an act in the exercise of his authority, nor explanatory of any contemporaneous act in the execution of his agency, is not competent evidence against his principal, nor against his principal's sureties.

APPEAL from the Circuit Court of Jackson.
Tried before the Hon. LOUIS WYETH.

[Memphis & Charleston R. R. Co. v. Maples.]

This action was brought by the appellant, "a body corporate under a charter from the States of Tennessee, Mississippi, and Alabama," against Moses Maples and Frank E. Cotten; was commenced on the 5th February, 1872, and was founded on a penal bond executed by the defendants as sureties, together with Samuel E. Kennamore, their principal, since deceased; which bond was dated the 4th May, 1868, and was conditioned for the faithful discharge by said Kennamore, as the plaintiff's agent at Paint Rock, of all the duties of his said office, without detriment or loss to the plaintiff by his act or default. The only breach of this bond, assigned in the complaint, was the failure of said Kennamore to pay over to the plaintiff "divers sums of money which had been collected by him, as agent aforesaid, during his said term of office." The defendants pleaded, "in short by consent," *nil debent*, and performance by the said Kennamore of all his duties as such agent; and also a special plea, which alleged, in substance, that on the 13th January, 1870, a violent storm of wind and rain passed over Paint Rock in Jackson county, which utterly demolished the depot-building at that station, and carried away and destroyed certain goods, tickets, &c., which were in the possession of said Kennamore as agent, and which were charged to him on the plaintiff's books, and the failure to account for which constituted the alleged default here sued for; that the loss thereby caused was unavoidable, and resulted from a force which no human power could control, and therefore the defendants were not responsible for it or its consequences. On each of these pleas issue was joined.

On the trial, as the bill of exceptions shows, the plaintiff read in evidence the bond on which the suit was founded, and then offered to read the deposition of S. R. Cruse, which had been taken on interrogatories and cross-interrogatories. Said Cruse was the plaintiff's secretary and treasurer, and resided at Memphis; and he testified that S. A. Kennamore was the plaintiff's depot-agent at Paint Rock station in Jackson county, from February, 1866, until February, 1870. The 4th and 5th direct interrogatories to this witness, and his answers thereto, were as follows: *Int. 4.* "State, also, how his account" [said Kennamore's] "in that employment stood, and yet stands with said plaintiff; whether the plaintiff was indebted to him, or he indebted to the company; and how that account now stands; and what balance, if any, exists against said Kennamore; and if so, how much, and when due, and on what consideration is it due, and for what." *Answer.* "S. E. Kennamore died indebted to the Memphis and Charleston Railroad Company, of which he was the

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agent at Paint Rock, Alabama; and after all credits were given him on account that were right and proper, his account shows him to be indebted to the said company in the sum of \$97.68; and said balance is the difference between the cash received by him for said company, and the amount paid over by him, including a claim (\$75) for stock killed, which the company has allowed him in the account." *Int.*

5. "Can you give a statement of the account, as it stands between them? If so, make the same a part of your deposition, and let it be certified by the commissioner," &c. *Answer.* "The account is herewith filed." The account appended to the deposition of the witness commences on the 28th February, 1866, and closes on the 28th February, 1870; and the entries consist of debits for "freights" and "passage," and credits for cash received, almost every day during that period. In answer to cross-interrogatories, the witness stated, also, "I am the secretary and treasurer of the said railroad company, and am the custodian of all books pertaining to the office of secretary and treasurer;" "I am able to state the account from the books of the company;" "All the information I have as to his indebtedness, and the mode of ascertaining it, I have given above;" "I receive and disburse the cash receipts of said company;" "I cannot, exclusively from memory, and without reference to said books, give the state of the account between plaintiff and said Kennamore." At the time of filing cross-interrogatories to this witness, the defendants also filed the following objections to the 4th and 5th direct interrogatories: "Defendants object and except to so much of the 4th interrogatory by plaintiff as begins '*how that account stands,*' and ending, '*if so, how much,*' &c.; and to any answer thereto, as may be taken or transcribed from any book or books of plaintiff—1st, because said evidence is secondary, and there is, or was, original evidence of said transaction; 2d, because no predicate has been laid for the introduction of secondary evidence. Defendants take and insist upon like specific objections to the 5th interrogatory, and assign said objections thereto."

When the plaintiff offered the deposition in evidence on the trial, as the bill of exceptions states, "the defendants urged the specific objections stated with their cross-interrogatories; which objections were severally sustained by the court, and the plaintiff thereupon, to each ruling, duly excepted. The defendants then, orally, and for the first time (other than said written objections) objected to the whole of said witness' answers to the direct interrogatories numbered 4, 5, and 6. To the allowance of this objection at this stage of the cause, and to the objection itself, the plain-

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tiff objected; but the court overruled plaintiff's objections, and sustained the defendants' said objections; to which rulings, severally, the plaintiff excepted. Afterwards, during the progress of the trial, the court altered its ruling in this regard, and instructed the jury that, if they determined from all the evidence that the said account was the original account of said S. E. Kennamore with the plaintiff, then they must not exclude said testimony from their consideration; and if they determined that said account was not the original, but a copy, they must exclude all that said witness stated in his answers to the 4th, 5th, and 6th interrogatories, in regard to that account, and statements he makes based on said account, or in reference to it. The court further instructed the jury at the same time, in this connection, that the best evidence of the account was the original account between the plaintiff and said Kennamore, and unless the plaintiff proved the loss or destruction of such original, neither the statements of the witness, nor a copy of the account, could be considered by them against the defendants' objections. To all which action of the court, and to each of said instructions separately, the plaintiff duly excepted."

The plaintiff then offered to read to the jury a written admission by the defendants, made before the trial was entered upon, "subject to all legal exceptions," "as to what plaintiff would prove by said Cruse, in addition to his deposition," as follows: "Plaintiff expects to prove, by said S. R. Cruse, *that the freight charge due upon balance of freight on hand January 1st, 1870, and the amount of freight charge due on freight received and undelivered, between January 1st and January 17th, 1870, did not amount to the balance due by said Kennamore in the account made a part of the deposition of said Cruse; and further, that the agents are never charged with the tickets received by them, except those which are actually sold, and reported by the agent as sold; and that in this case no tickets are charged, except those reported by said Kennamore as having been sold by him; also, that the default sued for in this action was not occasioned by the storm in January, 1870.*" The defendants admitted, "that said Cruse, if his deposition was taken, would make the statements herein contained;" but, when the admission was offered in evidence by the plaintiff, they objected to the italicized portion, but without specifying any particular ground of objection; which objection the court sustained, and the plaintiff excepted.

"The plaintiff next introduced John Snodgrass as a witness, who was the plaintiff's depot-agent at Scottsboro, in Jackson county, from 1863 up to the present time; and pro-

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posed to prove by him the instructions received, and the duties required by plaintiff of its depot-agents, in the years 1869 and 1870, and the custom of plaintiff to require said agents to report to the general office at Memphis, Tennessee, monthly, the cash received by them, tickets on hand unsold, and freight on hand on which the charges had not been paid; and that the depot-agents were required to make monthly reports—1st, to the general freight-agent, the freight undelivered, and the freight charges due and uncollected; 2d, to the general ticket-agent, the number of tickets on hand unsold; 3d, to the treasurer and secretary, the cash received and on hand; and that the treasurer and secretary only charges the depot-agents, upon his books, with cash received by agents. Witness stated, that his knowledge of these instructions, duties, and customs, was derived from the general printed orders of the company, issued at that time and addressed to the depot-agents generally; and that they were also printed on the stationery furnished by the company to its depot-agents, upon which they were required to make reports, and upon which the said agents made their said monthly reports; and that he only knew these instructions and customs from said printed regulations which came to his own office, except that he once assisted the agent at Woodville in said county in making out his reports, and he had the same instructions and printed regulations. To all of this proposed testimony by said Snodgrass, the defendants objected, and the court sustained their objections, so far as related to the testimony tending to prove the custom, regulations, and instructions of the plaintiff, but allowed it to go to the jury as evidence of the dealings of plaintiff with said witness, and in one instance with the agent at Woodville; and the plaintiff excepted. The plaintiff next proved, by said Snodgrass, that he had none of said printed instructions and regulations, but had some issued since that time, which were the same in all respects, except possibly in the matter of form, with those in use in 1869-70; and plaintiff offered to introduce in evidence the following printed regulations and instructions to depot-agents." (These instructions are dated, respectively, January 1st, and March 16, 1866, and relate to the various duties required of depot-agents.) "The defendants did not object to this evidence; but the court stated, that the court would charge the jury they could not consider it as tending to establish any custom or regulation of the plaintiff, or requirement or instruction by plaintiff to its depot-agents; to which statement of the court, and to the charge as proposed, and as actually afterwards given, the plaintiff duly excepted."

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The defendants had taken the deposition of George W. Kennamore, on the ground that "a material part of the defense depends exclusively on the testimony of said witness," but they did not offer it in evidence on the trial; and the plaintiff having offered it in evidence, the defendants objected to its admission, "on the ground that said witness lived in said Jackson county, within one hundred miles of the court-house; which objection was sustained by the court, and the plaintiff duly excepted." The plaintiff having here rested its case, the defendants introduced a witness who stated, "that he was familiar with the handwriting of said S. E. Kennamore, deceased, and that, in his opinion, the account exhibited with the deposition of said S. R. Cruse was not the handwriting of said S. E. Kennamore." Plaintiff then offered to prove by said witness, on cross-examination, "that said George W. Kennamore was the agent of said S. E. Kennamore, and conducted for him his said business as depot-agent; and that said George W. Kennamore had admitted to witness, shortly after said storm (about the 7th January, 1870), and while he was thus acting as clerk and business manager of said depot-agency for said S. E. Kennamore, that there was a package of money (\$17.50) which belonged to the plaintiff, sealed up, and put in the express-book the morning of the storm, to be sent to the plaintiff's secretary and treasurer, but which was blown away by the storm, and was afterwards found, and delivered to said George W. Kennamore, as such clerk and business manager for said S. E. Kennamore, and that he converted it to his use, and never accounted to plaintiff for it." The defendants objected to this testimony as proposed, "because it failed to connect S. E. Kennamore with it, and because it was hearsay, and because said George W. Kennamore was alive." The court sustained the objection, and excluded the evidence; to which ruling, also, the plaintiff excepted.

The several rulings of the court on the evidence, to which exceptions were reserved as above stated, with the charges to the jury, and the refusal of several charges asked, which require no special notice, are now assigned as error.

BEIRNE, HUMES & GORDON, for appellant.

STONE, J.—The testimony of the witness, Cruse, if he had knowledge of the matters whereof he spoke, was very inartificially taken. All he attests in reference to the account of Kennamore with the railroad, both debit and credit, he derives from the books in his office, as he himself testifies. When asked if he, from his memory, and without reference

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to his books, could give the state of account between the railroad company and Kennamore, its agent, he answered, that he could not. If he had shown that he himself had made the entries in the books, and had knowledge of their correctness when he made them, or had shown any thing equivalent to that, then he might have consulted the books, as aids to his memory, and could have testified to the correctness of the account.—1 Greenleaf's Ev. § 436; *Hudson v. The State*, 61 Ala. 334. He gives no such testimony, and says nothing tending to show he ever had any personal knowledge that the items composing the account were correct. If the account was made up of Kennamore's report as agent, or if it was based on his report, the witness fails to show it. The testimony does not tend, in the slightest degree, to show that the account appended to Cruse's deposition was made out by Kennamore, or his assistant, but, as we understand the evidence, it is nothing more than a copy of the book kept in the railroad company's office, without any legal proof that the book itself showed the correct state of the account. Nothing testified to by Cruise, or offered to be proved by him, touching the state of the account, was legal evidence.—*Godbold v. Blair*, 27 Ala. 592. As expressed, it appears all to have been derived from the books.

2. The testimony being hearsay, and substantially illegal, the court did not err in excluding it at any stage of the trial. There is nothing in the record to show that, upon a re-examination, Cruse could have given any legal testimony, tending to prove the correctness of the account; for it does not appear that he had any personal knowledge of the transaction. This, we understand to be the reason of the rule, which requires that motions to suppress testimony, for defects that can be remedied on a re-examination, must be made before the trial is entered upon.—*McCreary v. Turk*, 29 Ala. 244; *Grey v. Mobile Trade Co.*, 55 Ala. 387. The testimony, as we said, being substantially illegal, the court committed no reversible error in excluding it, no matter how moved for or granted.—1 Brick. Dig. 809, § 85; *Ib.* 810, § 93; *Ib.* 887, §§ 1189, 1190, 1197.

3. Much is said in the record about the original account, and a copy of it. We confess we do not perceive the pertinence or bearing of this. The account is not documentary evidence, to which the rules of primary and secondary evidence are adapted. The account, as shown, is in no sense a document, which the law pronounces the highest evidence of its contents, and which, when the foundation of a claim, must be produced, or its absence accounted for. Hence, we pass by, as immaterial, all that is said in the various rulings

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on this question, as harmless in their effect, whether the rulings were abstractly right or not. They neither did nor could do the appellant any injury.

4. Neither is it necessary we should criticise the court's rulings, on the subject of rules or instructions given to depot-agents, requiring monthly reports. Unless there was some evidence, which there is not, tending to show that Kennamore had made reports, and had therein charged himself, or that he had violated his duty in not making such reports, the proof that such instructions were given, or that it was the custom of the railroad company to so instruct its agents, could lead to no practical result whatever. The fundamental fault in the plaintiff's case, lies in the entire absence of facts, *testified to as facts*, proving, or tending to prove, that Kennamore had, as agent, received moneys which he had not accounted for. He may have been in default. The plaintiff did not prove it. Had the testimony, tending to prove instructions to agents to make monthly reports, been offered in legal form, accompanied by other proof, proposed to be made, that the account was made up from those reports, and in accordance with them, then the testimony might have been legal.—1 Brick. Dig. 809, §§ 83, 84. By itself, it did not tend to elucidate any question in issue.—*State v. Wisdom*, 8 Por. 511; *Governor v. Campbell*, 17 Ala. 566; *Magee v. Billingslea*, 3 Ala. 679; 1 Brick. Dig. 809, § 81; *Thompson v. Drake*, 32 Ala. 99.

5. The record brings to view one small item of alleged indebtedness from Kennamore, the depot-agent, to the railroad company. That item is the \$17.50, sought to be proved by the witness Geo. W. Kennamore, and by his admissions. First, of his deposition: That had been taken by the defendants, pending the suit, on an affidavit made by Maples, that his testimony was material for the defense, and that a material part of the defense depended exclusively on the testimony of said witness.—Code of 1876, § 3069, subd. 5. See, also, section 3078, which declares that, "when the deposition of a witness is taken for any other cause than being a female, the deposition can not be used, if it appear at the trial that the cause for which it was taken does not exist; unless such witness is dead, insane, or resides more than one hundred miles from the place of trial." We consider that this statute reaches this case. The cause for which this deposition was allowed and taken, was the danger of the loss of this witness' testimony by his death, removal beyond the jurisdiction of the court, &c. He was alive, a resident of the county, and within less than one hundred miles of the court where the trial was had.—*Mobile Life Ins. Co. v. Walker*,

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58 Ala. 290; *Henry v. Northern Bank of Alabama*, at the present term. The court did not err in refusing to allow the deposition to be read.

6. Conceding that Geo. W. Kennamore was, or had been, the agent of his brother, the depot-agent, the admission sought to be proved, as having been made by him, is not brought within any rule that allows it to be proved as evidence against his principal, or the sureties of his principal. The admission was not made at the time of doing an act in execution of his authority as agent, and was not explanatory of any contemporaneous act, made while in the execution of his agency, and thus constituting a part of the act. 1 Brick. Dig. 63, §§ 159, 160, 162, 164; *Rhodes v. Lowry*, 54 Ala. 4; *Baldwin v. Ashby*, *Ib.* 83. The admission sought to be proved in this case, is not even shown to have been made during the lifetime of the principal, and there is an entire absence of fact and circumstance, tending to show any act of agency was being done, which it could explain, or shed any light on.

We find no error in the record prejudicial to appellant, and the judgment of the Circuit Court is affirmed.

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Action on Promissory Note, by Payee's Administrator against Maker's Administrator.

1. *Limitation of action; suspension of statute in case of death.*—Under the present statute of limitations (Rev. Code, § 2918; Code of 1876, § 3244), without regard to the accrual of the cause of action, or the time of granting administration, the running of the statute cannot be suspended for a longer period than six months from the death of a testator or intestate.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. J. McCaleb Wiley.

This case was decided at the June term, 1874, but has never been reported. None of the papers have come to the hands of the present reporter, except an official copy of the opinion, which is here published by the order of the court.

PARKS & HUBBARD, for appellant.

J. N. WILLIAMS, *contra*.

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BRICKELL, J.—The action was commenced on the 28th March, 1872, and was founded on a promissory note made by the defendant's intestate in his life-time, falling due January 1st, 1861. The plea was the statute of limitations of six years. On the trial, the evidence was, that the plaintiff's intestate died in March, 1863; that administration on his estate was committed to the plaintiff, by the Court of Probate of Pike county, in May, 1863; and that on 8th May, 1871, the plaintiff not having resigned, nor been removed from the administration granted him in 1863, he obtained new letters of administration from the Court of Probate. The court charged the jury, if these facts were believed, the plaintiff could not recover; and this charge, to which an exception was reserved, is here assigned as error.

Prior to the Code, there were several decisions of this court, declaring that the statute of limitations did not run, until there was some one entitled to sue, and some one liable to be sued.—*Johnson v. Wrenn*, 3 Stew. 172; *Bohannon v. Chapman*, 17 Ala. 696; *Hopper v. Steele*, 18 Ala. 828; *Lawson v. Lay*, 24 Ala. 184; *Wyatt v. Rambo*, 29 Ala. 510. When a cause of action had not accrued at the death of a person in whom, when it did accrue, it would reside, under this construction, the statute of limitations did not commence running until the appointment and qualification of a personal representative capable of suing. The practical operation of this principle was, to induce much speculative litigation, which the lapse of time should have silenced, and, in the particular case, to let in all the mischief the statute of limitations was intended to avoid.

Pursuing a construction given the English statute at an early day, this court held, that if a cause of action, which had accrued, was not barred at the death of the testator or intestate, twelve months from his death should be allowed his personal representative to commence suit, although, otherwise, the bar of the statute would attach.—*Griel v. Jones*, 1 Stew. 254; *McNeill v. McNeill*, 35 Ala. 90. To render the statute practically, as well as theoretically, a statute of repose, the Code provides that the time between the death of a person and the grant of letters testamentary, or of administration, not exceeding six months, is not to be taken as any part of the time limited for the commencement of actions by or against his executors or administrators.—R. C. § 2918. Whether the cause of action had or had not accrued in the life of the decedent, and whether the statute had or had not commenced running, and without regard to when the administration is granted, for no longer period than six months can the operation of the statute be delayed. If administra-

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tion is granted during that period, the bar of the statute attaches from the grant. It is not, therefore, material to inquire, when the plaintiff's right of suit attached—whether on the grant of administration in 1863, or on the grant in 1871: whether on the one or the other, the statute had perfected a bar when the suit was commenced; and the court, on the undisputed facts, properly charged the jury the defendant was entitled to a verdict.

The judgment is affirmed.

Mayor & Aldermen of Wetumpka v. Wetumpka Wharf Company.

Bill in Equity by Holders of Municipal Bonds, to subject Taxes and Revenues to Payment.

1. *Judicial notice of charter of municipal corporation.*—The charter of a municipal corporation, and special statutes conferring on it additional powers for special purposes, are public statutes, of which the courts will take judicial notice; and all persons dealing with the corporation must, at their peril, take notice of the capacity to contract, its limitations and restrictions, thereby conferred on the corporation.

2. *Municipal corporation; power to borrow money, to issue negotiable paper, and to aid private corporations.*—In the absence of an express grant of power, a municipal corporation can neither borrow money, nor issue negotiable paper, nor become a party to such paper, nor become a stockholder in a private corporation, nor incur debts in aid of such private corporation; but, under the constitution of 1819, there was no inhibition against the grant by the General Assembly of express power to such corporation to incur debts, or to borrow money, or to issue negotiable securities, to be paid by municipal taxation, in aid of works of internal improvements.

3. *City of Wetumpka; powers of corporation under original charter.*—The original charter, or act incorporating the city of Wetumpka (Sess. Acts 1838-9, pp. 44-51), conferred upon that corporation only the governmental powers usually conferred upon municipal corporations at that time for the purposes of local government; and these did not include any powers for the encouragement of private gain, trading, speculation, or pecuniary profit, except as those objects might be indirectly promoted by a prudent exercise of the powers of local government.

4. *Same; under special acts of 1848 and 1850, in aid of works of internal improvements.*—The act approved February 29, 1848 (Sess. Acts 1847-8, pp. 223-5), authorized the corporate authorities of the city of Wetumpka to issue its bonds, not exceeding \$50,000 at any one time, and to appropriate the money arising from their sale to securing the right of way, and constructing a canal, around the lower end of the shoals of the Coosa river; and the amendatory act approved February 1st, 1850 (Sess. Acts 1849-50, p. 348), extended the amount to \$100,000, and authorized the money to be appropriated, under the supervision of the mayor and aldermen, "for any purpose of internal improvement for the benefit of the citizens of Wetumpka." In the case of *Mayor and Aldermen of Wetumpka v. Winter* (29 Ala. 651), this court decided that the said act of 1850 authorized the city to subscribe for stock in the Tallahassee

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Branch of the Central Plank-Road Company; and the court now adheres to that decision, so far as it affects the questions involved in the present case.

5. *Same; limitations and restrictions on this power.*—The said act of 1848, by its 1st section, expressly declared: "No bond shall be issued, but upon an entire concurrence of the board of mayor and aldermen, upon a full attendance of all the members of the board, and when there is no vacancy; which shall be made manifest only by an entry of the order for issuing being made on the minutes of the board, and signed by each member thereof; nor shall any contract amounting to one hundred dollars, made under any of the provisions of this act, be valid, which is not made under all the restrictions in this section recited." These limitations and restrictions were not relaxed, nor in any manner modified, by the subsequent act of 1850; and they are applicable to all bonds issued under that act.

6. *Same; when purchaser is chargeable with notice of such restrictions.*—A purchaser of a bond issued under the said act of 1850, and reciting on its face that it was so issued, is chargeable with notice of these restrictions and conditions, and can not claim protection as an innocent holder, although the bond also recites that it was issued in conformity with the statute.

7. *Assignment of judgment.*—The assignee of a judgment succeeds only to the rights of his assignor, and can not claim protection against equities which were binding on his assignor.

8. *Negotiable paper; rights of holder, and burden of proof.*—The doctrine has been long settled in this court, as to negotiable paper, that when fraud or illegality in putting it in circulation is shown, or any defense addressed to its consideration, the *onus* is cast on the holder to prove that he acquired it in good faith, before maturity, upon a valuable consideration, and in the usual course of business.

9. *Conclusiveness of judgment.*—A judgment against a municipal corporation, on a bond issued under authority conferred by a special statute, is conclusive on the corporation, as to the validity of the bond, and as to all defenses which might have been urged against it at law; but, when the owner of the judgment files a bill in equity against the corporation, to enforce a statutory trust, by which the property and revenues of the corporation were pledged and appropriated to the payment of the bonds to be issued under the authority of the statute, the corporation is not precluded by the judgment from showing that the bond was in fact issued in violation of the conditions, limitations, and restrictions imposed by the statute.

APPEAL from the Chancery Court at Wetumpka.

Heard before the Hon. CHARLES TURNER.

The original bill in this case was filed on the 29th October, 1870, by the Wetumpka Wharf Company, a domestic corporation, having its principal place of business at Wetumpka, against the municipal authorities of the city of Wetumpka; and sought to subject to the satisfaction of a judgment, which one Howell Rose had recovered against the city on the 15th October, 1855, and which he transferred to the complainant on the 27th October, 1857, certain real estate belonging to the city, with its rents, income, and profits, and to sequester and appropriate the city taxes for the same purposes. The judgment, a copy of which was made an exhibit to the bill, was rendered in an action on a bond, which, as set out in the complaint, was in these words:

"STATE OF ALABAMA, } In virtue of an act of the legislature
Coosa County. } of Alabama, passed on the 29th day
of February, 1848, authorizing the mayor and aldermen of

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the city of Wetumpka to issue bonds under the corporate seal of said city; and in virtue of an act of the General Assembly of said State of Alabama, passed on the 1st day of February, 1850, amendatory of the act first aforesaid; the city of Wetumpka promises to pay Howell Rose, or order, the sum of thirty thousand dollars on the 1st day of July, 1855, for value received. In witness whereof, William S. Kyle, as mayor of the city of Wetumpka, and Thomas P. Dale, as treasurer thereof, have hereunto set their hands, and affixed the seal of the city of Wetumpka, this 24th day of June, 1850." (Signed and sealed as specified.)

The bill alleged that this bond was given for money loaned by said Howell Rose to said city of Wetumpka, to pay its subscription to the capital stock of the Central Plank-Road Company; that, in addition to said bond, and as further security for said loan, Rose required the individual bonds or notes of several citizens of Wetumpka, amounting in the aggregate to said sum of \$30,000, and a mortgage or deed of trust on the taxes accruing to the city and certain real estate belonging to it, known as "the wharf property;" that these notes were accordingly given, and this mortgage or deed of trust was accordingly executed, not only for the security of Rose, but also for the security and indemnity of the citizens who had thus given their individual notes; that the bond to Rose was issued "under the authority conferred upon said corporation by the legislature of Alabama, and in strict conformity to the power so conferred;" "that when said bond was issued, and said deed of trust executed as aforesaid, there were no vacancies in the board of aldermen of said city, and the issuance thereof was assented to and approved by the unanimous vote of said mayor and aldermen, all of whom joined in the execution of said deed of trust;" and "that said mayor and aldermen were fully authorized and empowered by the charter of said city and the amendments thereto to issue said bond to Rose, and to execute said mortgage or deed of trust to secure the same."

The said deed of trust, a copy of which was made an exhibit to the bill, contained the following recitals and provisions: "*Whereas*, by an act of the General Assembly of the State of Alabama, approved February 29th, 1848, entitled 'An act to amend an act to incorporate the town of Wetumpka, and also by an act of the General Assembly of said State approved February 1st, 1850, amendatory thereof, the mayor and aldermen of the city of Wetumpka are authorized to issue bonds under the corporate seal of said city, and the money arising from the sale of said bonds to be appropriated, under the supervision and direction of the mayor and

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aldermen of said city, for any purpose of internal improvement for the benefit of the citizens of Wetumpka: *And whereas*, it is believed that the contemplated plank-road, to be commenced at Wetumpka, on the Coosa river, and to be constructed and laid to Gunter's Landing, or such other eligible points or places on the Tennessee river as may be selected, with such other roads as may be constructed running to the country lying northwardly and above Wetumpka, will add to the prosperity, and prove beneficial to the citizens of Wetumpka; and, with this view, the mayor and aldermen have subscribed for, and taken in their names, for the use of said city, three hundred shares of stock in the Central Plank-Road Company; and, to raise the sum of thirty thousand dollars, for the purpose of paying the installments to said Central Plank-Road Company, and the said three hundred shares of stock, the said mayor and aldermen have executed their bond, under the provisions of said two acts of the General Assembly, for the sum of thirty thousand dollars, due and payable on the 1st day of July, 1855, to Howell Rose or order; to which bond are appended coupons for the payment of a semi-annual interest, at the rate of eight *per cent. per annum*, each being for the sum of \$1,200, payable to Howell Rose or order," &c., particularly describing each coupon; "and the treasurer of the city of Wetumpka having sold said bond at par value, and having received \$30,000, the money arising therefrom; and said sum of \$30,000 having been appropriated, under the supervision and direction of the mayor and aldermen of Wetumpka, for the purpose of internal improvement, in the construction of said plank-road, for the benefit of the citizens of Wetumpka: *And whereas*, also, the said Howell Rose, before paying over said sum of \$30,000, required further security for the re-payment of the same; and the following named persons, citizens of Wetumpka and its vicinity, have assumed, as collateral security for the re-payment of said \$30,000, the sums specified in their respective notes, as hereinafter set forth, to-wit," specifying the names and amounts; "all of which notes are dated the 1st July, 1851, and due five years from their date: *Now, in consideration of the premises*, and to secure the payment of said \$30,000, together with the interest which may accrue thereon, due and payable semi-annually as hereinbefore provided, as well as to secure, indemnify, and save harmless from all loss, liability, or payment of any sum of money by any of the above-named citizens, for or on account of the said notes so executed as collateral security as aforesaid; and for the further consideration of ten dollars, paid to the mayor and aldermen of Wetumpka, by Aaron Ready, David C. Neal, and Seth P.

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Storrs, the receipt whereof is hereby acknowledged; the mayor and aldermen of the city of Wetumpka *have bargained, sold, and conveyed*, and, by these presents, do give, grant, bargain, sell, alien, convey, and confirm, unto the said David C. Neal, Aaron Ready, and Seth P. Storrs, their successors and assigns, all the taxes arising from assessments on the real estate in the corporate limits of said city, together with the real estate belonging to said corporation, with the rents, issues, and profits thereof; and the same is hereby pledged by the said mayor and aldermen, and appropriated for the final payment of said \$30,000, and the interest accruing thereon, as well as to secure, indemnify, and save harmless from loss or liability, the citizens herein-before named, their heirs, executors, administrators, or assigns, for or on account of the said notes executed by them as aforesaid. And the said mayor and aldermen do hereby bind themselves and their successors, so far as they are empowered to do, that the present rates of wharfage for all articles or commodities shipped to or from Wetumpka, or in any manner passed on any of the wharves or landings in Wetumpka, shall not be diminished, nor shall the tax upon steamboats, or other water-craft, landing at the points in the city of Wetumpka wharves, or elsewhere, be decreased from the present rates, until all of said debt is fully paid off and discharged, and all the evidences of debt accruing or originating therefrom be taken up and cancelled. And the said mayor and aldermen do further sell and convey unto the said David C. Neal, Aaron Ready, and Seth P. Storrs, the following real estate," particularly describing it, "with all the wharf or wharves, with all and singular the privileges to all and every wharf or building in said city of Wetumpka, with all the rights and benefits accruing, or that may arise therefrom in any manner whatever; also, the market-house in said city of Wetumpka, with all and singular the rights, privileges, and appurtenances thereunto belonging, or in any manner appertaining; also, three hundred shares of stock in the Central Plank-Road Company, together with the rents, issues, dividends, and profits arising therefrom. *To have and to hold*," &c., to the said Neal, Ready, and Storrs, "their survivors, or assigns, forever. *Provided*, however, if said coupons are all paid at maturity, and said bond for \$30,000 is fully paid at maturity, and none of the citizens hereinbefore named, who have executed said notes as collateral security as aforesaid, do pay, or are required to pay, any part of said notes, but the same are all given up to the respective makers thereof to be cancelled, without any demand or claim against any of said makers, for or on account of any

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of said notes ; then this deed of conveyance and trust to be void, and of none effect. But, in default of payment of any of said coupons as they become due and payable respectively, or if said bond for \$30,000 is not paid at maturity ; then, in either event, the said David C. Neal, Aaron Ready, and Seth P. Storrs, their survivors or assigns, are hereby fully authorized and empowered to seize and take possession of all or any portion of said bargained and described premises, the wharf, and wharfing privileges, with the rights and immunities thereof, and the said three hundred shares of stock in said plank-road company, with the dividends thereof, or so much of said mortgaged and conveyed premises, rights, privileges, and appurtenances, as may be necessary to pay off and fully discharge any amount due and unpaid on said coupons, or bond for \$30,000 ; and, after advertising a sale for thirty days, in a public paper printed at Wetumpka, may proceed to sell sufficient to pay off the amount of such coupons as are then due and unpaid, as well as so much of said \$30,000 bond as is then due and unpaid ; first paying all expenses incurred in making a sale, or in executing the trusts aforesaid. And in case any of the above-named citizens, who have executed their notes as aforesaid, shall, of their own accord, or by compulsion of legal process, pay, or cause to be paid, any of said collateral notes so given as aforesaid ; then, on application of such citizen, who has paid, or caused to be paid, any of said notes, or any part thereof, his executors, administrators, or assigns, said David C. Neal, Aaron Ready, and Seth P. Storrs, their successors or assigns, shall seize and take into immediate possession the above-bargained premises, wharfage, stock, dividends, rents, issues, and profits arising therefrom, with all the privileges and appurtenances thereof, or so much as may be necessary to pay off, indemnify, and save harmless from the payment of principal and interest and cost, accrued on account of any of said notes, and sell the same upon the same notice, terms and time, as hereinbefore above provided ; all sales to be made at the market-house in Wetumpka, and the proceeds applied to the payment of costs and necessary expenses of carrying out and fully executing said trust, and to the full payment and indemnity of all and any amount which has been paid for or on account of any of said notes so given as aforesaid ; the same to be paid by said David C. Neal, Aaron Ready, and Seth P. Storrs, their survivors, or assigns," &c. "And the said mayor and aldermen do hereby stipulate and agree to pay from the revenues and resources of the city of Wetumpka such amounts as can be realized and appropriated, having due regard to the ordinary expenses and other debts of the

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city, at least once in every six months, to the extinguishment of the debts due or not due, as the funds accumulate in the city treasury. And the said Howell Rose, for himself, his executors, administrators, or assigns, does hereby stipulate and agree to receive any amount which may be paid by the mayor and aldermen of Wetumpka, or any other person or persons, on account of said debt for \$30,000, and interest, or offered within three days of the first days of January or July in each and every year, from the date hereof, until the full and final payment of the said debt; and if any payment is offered to be made, and is paid, upon any claim before maturity, said Rose agrees to discount the interest on whatever amount is paid upon debt not due, from time of payment until the maturity of said debt, at the rate of eight *per cent. per annum*. And the said David C. Neal, Aaron Ready, and Seth P. Storrs, trustees, hereby bind themselves, so far as in their power, to carry out the trust herein created, to the best of their skill and ability. In witness whereof," &c. (Signed by the mayor and six aldermen, and countersigned by the city clerk and treasurer, with the seal of the city of Wetumpka affixed; also, by said Howell Rose, Neal, Ready, and Storrs.)

The bill alleged, also, that default was made in the payment of the said bond for \$30,000, and thereupon, on the 12th August, 1858, David C. Neal, the sole surviving trustee, sold the property conveyed, in strict compliance with the terms of the deed; that at said sale Benjamin Trimble became the purchaser of a part of the real estate, "known as the wharf property," and with it the right of collecting wharfage dues, and received the trustee's deed for the same; that the money realized at the trustee's sale was applied in part payment of the bond to Rose, and the judgment afterwards recovered on the bond by Rose was for the residue only; that Trimble took possession under his purchase, and soon afterwards sold and conveyed to the complainant; and that afterwards, on the 13th July, 1867, the complainant entered into a written agreement with the mayor and aldermen of the city of Wetumpka, for the adjustment and settlement of all these matters, under authority conferred on said mayor and aldermen by a special act of the legislature of Alabama; a copy of which agreement was made an exhibit to the bill, and which was in the following words:

"*This agreement, made and entered into this 13th day of July, 1867, between the mayor and aldermen of the city of Wetumpka, of the first part, and the Wetumpka Wharf Company, of the second part, witnesseth,*" &c.; reciting the execution of the bond to Howell Rose, the execution of the

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mortgage or deed of trust for its security, the sale under the deed by the trustee, the purchase by Trimble, the conveyance by Trimble to the complainant, and the rendition and assignment of the said judgment recovered against the city by Rose; and then proceeding as follows: "*And whereas*, by an act entitled 'An act to authorize the corporate authorities of Wetumpka to subscribe to the capital stock of the South and North Alabama Railroad, the Bank of Alabama, and for other purposes,' approved February 25, 1860, the General Assembly of Alabama did authorize the corporate authorities of said city to issue bonds, and to levy an additional tax of one-half of one per cent. on the real estate in said city, by and with the consent of a majority of said real estate [owners], for the purpose of paying the indebtedness of said city: *And whereas*, on the 8th day of May, 1867, the said corporate authorities did levy said tax, and order an election to be held on the 21st day of May, 1867; at which said election, a majority of the real estate owners did vote in favor of said tax, and the same is now a law of said corporate authorities: *And whereas*, the said Wetumpka Wharf Company, actuated by a spirit of liberality, and a desire to see the said city of Wetumpka free from debt, have agreed to settle the claims it holds against said city, or the mayor and aldermen of said city, on the following terms and conditions: The said mayor and aldermen have caused to be duly executed twenty bonds or notes, each for the sum of \$1,562, due and payable as per list hereto attached; which bonds the said company hereby agrees to accept in full payment for the said judgment above mentioned, and for any and all interest which said company has on said wharf; *provided*, each and all of said bonds shall be promptly paid in full at the date of maturity; and as soon as said bonds are delivered to said Wetumpka Wharf Company, said company agrees hereby, in order to assist said mayor and aldermen in paying said bonds, to put the said mayor and aldermen in possession of said wharf, giving them full control over it, its rents and receipts; on condition, that they will adopt and collect the same rates of wharfage as are now charged for wharfage at Montgomery; and on the further condition, that the said bonds shall each be promptly paid at maturity. But, should the said mayor and aldermen of Wetumpka fail to pay any one of said bonds at maturity, then, and in that case, they hereby agree at once to surrender to said company the said wharf, its rents and receipts; and this agreement is, in that event, declared null and void. But, if the said bonds should all be paid at maturity, then, and in that event, the said company hereby agrees to make a full surrender of all its

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title and interest in and to said wharf and said judgment, to the said mayor and aldermen, in such form as they may desire; *provided*, further, that for any payments the said city may make of said twenty bonds, she shall be entitled to a credit on said judgment, for the amount thus paid. And it is further agreed, that should any of said bonds not be paid on the day of maturity, then, and in that case, the said mayor and aldermen shall be allowed sixty days in which to pay said bond, before they shall be required to surrender the possession of said wharf, its rents and receipts, into the hands of the said company, and before this contract shall be declared void. Signed in duplicate, this 13th July, 1867," by *W. A. Allen*, as mayor of Wetumpka, and *Richard Smoot*, as chairman of the Wetumpka Wharf Company.

The bill further alleged, that the mayor and aldermen had full power and authority to enter into this contract; that the wharf property was delivered to them pursuant to the terms of the contract, and they continued in possession up to the filing of the bill; that they paid five of the bonds, those which first matured, but wholly made default in the payment of the others; that they refused to deliver up the wharf property, on the complainant's demand after their default, but continued to collect the rents and profits, wharfage dues, and taxes on the real estate, and appropriated them to other purposes, and that the city is insolvent. The prayer of the bill was for an injunction, restraining the mayor and aldermen from further collecting or receiving the taxes on real estate in the city, or the rents, profits, issues, and wharfage dues, arising or accruing from the wharf property; for the appointment of a receiver, with power to collect and receive the said moneys; that the taxes on real estate might be sequestrated, and collected under the order and direction of the court, through the corporate authorities or otherwise, and applied to the satisfaction of the complainant's debt; also, for an account, and for general relief.

J. B. H. Smith, a citizen of Maryland, was joined as a defendant to the bill, with the mayor and aldermen, on an allegation that he "claims to hold certain other bonds issued by said mayor and aldermen of the city of Wetumpka, and claims some interest in the real estate and taxes of said city; the precise nature and extent of which claim are unknown to complainant, but it is subordinate to the complainant's claim herein set forth." An answer was filed by said *Smith*, alleging that he was the owner and holder of eleven bonds issued by the corporate authorities of the city of Wetumpka, to pay the city's subscription to the capital stock of the Tallassee Branch of the Central Plank-Road Company; that

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said bonds, with the others issued for that purpose, each for \$500, were issued by said mayor and aldermen under authority conferred on them by an act of the General Assembly approved February 29th, 1848, and the amendatory act approved February 1st, 1850; "that said bonds were issued upon an entire concurrence of all the members of the board of mayor and aldermen of said city, upon a full attendance of all the members of the said board, and when there was no vacancy, which was made manifest by an entry of the order for issuing said bonds being made on the minutes of said board, and signed by each member thereof;" that these bonds were acquired by the respondent for valuable consideration, and were past due and unpaid; that the wharf property and other real estate belonging to the city, and also the taxes on real estate, were, by the terms of the statutes under which the bonds were issued, pledged for the security and payment of all these bonds, as well as the bond to Howell Rose; that these facts were well known to the complainant, or to the persons composing the company, when they acquired their claims against the city; and that the respondent's equity, under the facts stated, was at least of equal dignity with the equity asserted by the complainant. He prayed that his answer might be taken as a cross-bill, under the rules of practice; that a lien might be declared in his favor, to the extent of the amount due on the bonds held by him, on the real estate described in the original bill, with the rents, issues, and profits thereof; that the complainant in the original bill might be compelled to account for the moneys received and collected from these sources; that the property might be sold, and the proceeds of sale appropriated, under the order of the court, according to the provisions of the statutes under which the bonds were issued.

A copy of one of the bonds held by Smith was made an exhibit to his answer, and was in these words, though in a different form: "United States of America; State of Alabama. City of Wetumpka Stock for subscription to the stock of the Tallassee Branch of the Central Plank-Road Company. A Loan of Fifteen Thousand Dollars. Passed by the unanimous vote of the Mayor and Aldermen of the City of Wetumpka, on the 19th day of June, 1851. By special authority of the State of Alabama, by an act passed January 10th, 1839, and amended February 1st, 1850, the Mayor and Aldermen of the City of Wetumpka acknowledge themselves to be indebted to the Tallassee Branch of the Central Plank-Road Company, or bearer, for value received, in the sum of Five Hundred Dollars; which sum said Mayor and Aldermen of the City of Wetumpka promise to pay to

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the said Tallassee Branch of the Central Plank-Road Company, or to the holder hereof, at the Bank of America, in the city of New York, on the 1st day of July, in the year 1856, and also interest thereon, at the rate of eight *per cent. per annum*, semi-annually, on the first day of each January and of each July ensuing the date hereof, until the said principal sum shall be paid, on the presentation of the annexed Interest Warrants at said Bank. And said Mayor and Aldermen of the city aforesaid further agree, that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special indorsement, or by delivery, as if the same were a note of hand payable to bearer. In testimony whereof, the said Mayor and Aldermen of the City of Wetumpka have hereunto caused to be affixed their corporate seal, and these presents to be subscribed by the Mayor, this 1st day of July, 1851."

An answer to the bill was filed by the mayor and aldermen of Wetumpka, in which they admitted the borrowing of the money from Rose, and the execution of the bond for its repayment; but they denied that this was done in pursuance of the powers conferred on the corporate authorities by the special statutes referred to, or in compliance with the requisitions of the statutes; and alleged, on the contrary, that the limitations and restrictions imposed on them by the statutes, which were stated at length, were violated and disregarded. They admitted, also, the recovery of the judgment by Rose, its assignment to the complainant, the execution of the conveyance to the trustees, the sale by the surviving trustee, at which Trimble became the nominal purchaser, and the subsequent agreement between the complainant and said corporate authorities; but they denied that any of those things were done in good faith, and alleged that they were effected by fraud and collusion between said Rose and the several persons composing the Wetumpka Wharf Company, who also constituted a majority of the board of mayor and aldermen of the city; and they stated with particularity the facts connected with these alleged frauds. They also filed an answer to the cross-bill of Smith, and denied the validity of the bonds held by him, alleging that they were issued in violation of the express provisions of the statutes to which they refer.

A temporary injunction was granted by the chancellor, on the filing of the bill; and after answer filed, he refused to dissolve the injunction on motion, either for want of equity in the bill, or on the denials of the answer, which was not under oath. A receiver was afterwards appointed, by consent, and another receiver was substituted during the pro-

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gress of the cause. No testimony was taken by any of the parties. The cause was submitted for final decree on the pleadings and exhibits attached. The chancellor held, that the bond given to Howell Rose, and the several bonds held by Smith, were valid and binding on the city of Wetumpka, and could not be avoided on the grounds set up in the answer of the corporate authorities; that the deed of trust to Neal and others was void, for want of authority in the mayor and aldermen to execute it, and all subsequent proceedings under it, and claims founded on it, were also void and of no effect; that the statute itself created a pledge and appropriation of the taxes and real estate of the city for the payment of the bonds, which the court would enforce in favor of the holders of the bonds. He therefore ordered an account to be stated by the register, to ascertain the amount due to the complainant and Smith respectively, charging the complainant with all payments made on the judgment in favor of Rose, and with the rents and profits of the wharf property while in its possession; and on the coming in of the register's report, which he confirmed, he rendered a decree against the city, in favor of the complainant, for \$27,301.77, and in favor of Smith for \$14,350.09; and declared a lien in their favor "upon the taxes arising from assessments on real estate in the corporate limits of said city, and upon the real estate belonging to said corporation, with the rents, issues, and profits thereof, until the said sums, with interest and costs, shall be fully paid and satisfied, and that said lien be enforced by a sequestration of said taxes," &c.

From this decree the mayor and aldermen of Wetumpka appeal, and here assign it as error.

J. FALKNER, for the appellant.

THOS. H. WATTS, and D. CLOPTON, *contra*.

BRICKELL, C. J.—The cause was heard on the pleadings and exhibits, no other evidence being introduced than that which is to be found in the recitals contained in the exhibits to the original bill, and the cross-bill filed by Smith. The averment of the original bill is, that the bond of the city of Wetumpka, issued and payable to Howell Rose, was for money advanced and loaned by Rose to the mayor and aldermen, to pay the subscription of the city to the capital stock of the Central Plank-Road Company. It is further averred, that the bond was issued under authority conferred by the legislature, and in strict conformity to the power so conferred. The bond is under the corporate seal, and on its

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face recites that it is issued in virtue of an act of the legislature of Alabama, passed on the 29th day of February, 1848, authorizing the mayor and aldermen of the city of Wetumpka to issue bonds under the corporate seal of said city, and in virtue of an act of the General Assembly of said State of Alabama, passed on the first day of February, 1850, amendatory of the act first aforesaid.

The averments of the cross-bill are, that the eleven bonds held by Smith are part of a series of bonds, amounting in the aggregate to fifteen thousand dollars, which were issued in sums of five hundred dollars each, to pay the subscription of the city to the stock of Tallassee Branch of the Central Plank-Road Company; that the bonds were issued upon an entire concurrence of all the members of the board of mayor and aldermen of said city of Wetumpka, upon a full attendance of all the members of the said board, and when there was no vacancy; which was made manifest by an entry of the order for issuing said bonds being made on the minutes of said board, and signed by each member thereof. One of the bonds is exhibited, and on its face recites as follows: "City of Wetumpka stock. For subscription to the stock of the Tallassee Branch of the Central Plank-Road Company. A loan of \$15,000.00. Passed by the unanimous vote of Mayor and Aldermen of the City of Wetumpka, on the 19th day of June, 1851. By special authority of the State of Alabama, by an act passed January 10th, 1839, and amended February 1st, 1850." &c.

The answer to the original bill, which, by consent, was taken also as an answer to the cross-bill, sets out the first section of the act of 29th February, 1848 (to which further reference will be made); and in express terms denies that the bond to Rose was issued in conformity to it. The denial proceeds further, and negatives the issue of the bond upon an entire concurrence of the board of mayor and aldermen, and the manifestation of such concurrence by an entry of the order for issuing on the minutes of the board, and the signing of such entry by the mayor and aldermen. This denial, under the agreement accepting the answer as an answer to the cross-bill, extends to the bonds of Smith.

The burden of proving every material fact, upon which his case primarily depends, if it is put in issue, rests upon the plaintiff, in courts of law and equity. If it be essential to the relief claimed by the plaintiff in the original, or cross-bill, that it should be shown that the bonds preferred as debts against the city were issued with the entire concurrence of the board of mayor and aldermen, when there was no vacancy in the board, and that this concurrence was made manifest by an entry on the minutes of the board signed by the mayor and al-

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dermen, the burden of proving the fact rests on them. How far it is essential, and whether the fact is proved, are of the important questions to be decided.

The original charter, or act incorporating the city of Wetumpka, was approved January 30th, 1839.—Pamphlet Acts, 1838-9, pp. 44-51. It varies from the usual charters of municipal corporations, when, as they were at the time of its enactment, the subjects of special legislation, in no other respect than in conferring corporate powers adapted to the situation of the city, on and intersected by the Coosa river, a navigable water-course. The territorial limits of the city are defined; the name and style of the corporation are declared to be the mayor and aldermen of the city of Wetumpka, with capacity to sue and be sued by that name, and to purchase, receive, hold, grant, alien, or assure property, real, personal or mixed; to have and use a common seal, *and to do and perform all and singular such acts as are incident to bodies corporate*. The qualifications of the mayor and aldermen are prescribed, and the mode of appointing them, an election annually by the qualified voters of the city. The powers of the mayor and aldermen are carefully and specifically defined and enumerated; and all relate to the internal government of the city, the promotion and preservation of its peace, order, and health. A limited power of taxation is conferred, which was not to exceed annually one *per-centum* upon unimproved, and one fourth of one *per-centum* on improved real estate. The mayor and aldermen had power to appoint, and remove at pleasure, a clerk and treasurer, and to require of them such bond and security as they deemed necessary.

Municipal corporations are strictly of political institution; they are but parts of the internal government of the State. All their purposes and objects are public, and the power they exercise, if not delegated to them, would reside in the General Assembly, or in some other department of the government. There is not a power the city could exercise through the agency of the mayor and aldermen, under the original act of incorporation, that is not governmental; and these powers are confined in the sphere of operation to the territorial limits of the city. As created, the corporation falls precisely within the definition of a municipal corporation, given in *Cuddon v. Eastwick*, 1 Salk. 192, "an investing the people of the place with the local government thereof." Private gain, trading, speculation, or the derivation of pecuniary profit, are not purposes or objects within the contemplation of the charter; and no powers are conferred to stimulate, encourage, or advance such purposes, further than the incidental encouragement and advancement, which may fol-

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low a prudent exercise of the powers of local government. Because of their public character, and of their relation as agencies to the government of the State, it is not necessary to plead or prove their acts of incorporation. Courts take judicial notice of them, as they do of other public, general statutes.—*Case v. Mayor*, 30 Ala. 538; *Smoot v. Mayor of Wetumpka*, 24 Ala. 112. Being public statutes, of which all are supposed to be informed, all who may enter into transactions with the corporations, must, at their peril, take notice of the capacity to contract which is conferred; and if there is a want of capacity, they are in a condition analogous to that of those who deal with infants, or married women, or other persons not *sui juris*.

An implied or an incidental power to issue, or to become a party to negotiable paper, or to borrow money, could not be claimed by the city, under the original charter. The power is not expressly conferred; and it could not be deemed appropriate to the execution of the powers which are conferred. A certificate of indebtedness, a warrant on the treasury, would be the most appropriate form (as it was when the charter was enacted, the usual, and probably, the only form adopted), which could be given to the evidence of the liability of the city, if it was found necessary to contract a debt. Such a certificate, or warrant, not having the elements of negotiability, it is unimportant into whose hands it might pass, or on what consideration, could not acquire the immunity of commercial paper, cutting off defenses which the city could make against its enforcement. If its officers and agents issued them fraudulently, or in negligence, the fraud or negligence would furnish just ground of defense against their enforcement; or, if the consideration on which they are founded failed, or any other just ground of defense existed, it would be as availing against a subsequent holder, as against the party to whom they were issued.—*N., M. & C. R. R. Co. v. Dunn*, 51 Ala. 128. In this case, following *Police Jury v. Britton* (15 Wall. 566), this court held, that a municipal corporation, not expressly clothed with power to borrow money, or to issue negotiable paper, could not give to the evidence of its debts the form and immunity of negotiable paper. It was said, "Other means, better adapted to the execution of the corporate powers, and less hurtful to the inhabitants of the city, can be found for the consummation of all corporate purposes."—See, also, *Mayor &c. v. Ray*, 19 Wall. 468.

Private corporations, especially if created for trading purposes, may have an incidental or implied power to borrow money. There is but a limited analogy between such cor-

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porations, and corporations like that of the city of Wetumpka, created wholly for civil and political purposes. The latter corporations have no capital, and no corporate property, except that which is held for public uses. Debts may be contracted by them; but the only source of payment is the revenue derived from taxation, or from charges imposed on persons under their authority making individual use of the corporate property, such as markets, &c. Whoever contracts with such corporations must know that from these sources only can they derive the means of payment; and the just presumption is, that he looks to and relies alone upon them for the satisfaction of his demand.—*Simpson v. Lauderdale*, 56 Ala. 64. The power to borrow money is essentially different from the power to contract debts in execution of the purposes of municipal corporations. In *Mayor v. Ray*, *supra*, it was said on this question: "Such a power does not belong to a municipal corporation, as an incident of its creation. To be possessed, it must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course, to local governments, to raise loans. Such governments are not created for any such purpose."

The most efficient safeguard which the community have against the abuse of corporate power, by the agents and officers of municipal corporations, necessarily intrusted with its exercise, is the short official term, and their direct responsibility to their constituents. The greatest security against waste and extravagance is, that the expenditures and debts of the corporation are to be satisfied from taxation, which the constituents must bear. If money could be borrowed, experience admonishes us that taxation would be postponed, official responsibility evaded, the vigilance of the constituents relaxed, corporate powers abused, and the corporate government would often become a grievous burden, instead of advancing the interests and convenience of the people within its jurisdiction.

The whole legislative policy of the State has indicated disfavor of commercial paper, even as employed by individuals in private business transactions. The character of paper usually employed has been shorn of all immunities attending commercial paper; and whoever acquires it is forewarned that he succeeds only to the rights of his transferrer, and is subject to every defense which the party sought to be charged, would be entitled to make, if there had not been a transfer. When the legislative power creates a municipal corporation, for the purposes of local government, conferring powers in the exercise of which debts may be incurred, it is easy to say that the corporation may give these debts the

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form of negotiable paper, if it is intended that it should. In the absence of the grant of the power, an implication of it would infringe the policy to narrow the use of such paper in ordinary transactions, which the general statutes clearly manifest.

The power of taxation in the charter of the city of Wetumpka, as it was in the charters generally which were enacted in that period of our history, was limited; and from taxation only the means of paying debts could be derived. The debts could properly originate only in the execution of the purposes of the incorporation. If a power to borrow money was deemed incidental, or should be implied, it would be difficult, if not impossible, to confine the debts to these purposes. There would be no limit of the power, as to third persons who, in good faith, should make the loans, other than the discretion of the corporate officers and agents; and the money could easily be diverted from the purposes and objects of the corporation. A careful examination of our legislation, prior and subsequent to the original incorporation of the city of Wetumpka, shows that, whenever it was intended municipal corporations, or counties, which are *quasi* municipal corporations (and these embrace all our public corporations), should have power to issue negotiable paper, or to borrow money, the power has been expressly conferred, or other than governmental power has been conferred, which could not be advantageously exercised without the use of such paper, or without obtaining loans. The result is, that the bonds now sought to be enforced were unauthorized by the original act of incorporation: the bond to Rose, because its consideration was money borrowed, by the mayor and aldermen; the bonds held by Smith, for the same reason, and because they are negotiable paper.

Whatever may be the diversity of opinion, as to the implied or the incidental power of a municipal corporation to borrow money, or to issue or become a party to negotiable paper, there is but little, if any, that without an *express grant of power* the corporation can not become a shareholder, or a stockholder, in a private corporation, or borrow money, or incur debts, to aid extraneous objects.—Dillon on Mun. Cor. § 106; *Town of South Ottawa v. Perkins*, 94 U. S. 262; *Town of Cotoma v. Eanes*, 92 U. S. 284. Authority to subscribe for the stock of the Central Plank-Road Company, and of the Tallassee Branch of the road, and to borrow money, or to issue negotiable paper to pay the subscription, is claimed under the act of February 29th, 1848, and the act entitled "an act amending the act incorporating the City of Wetumpka," approved February 1st, 1850.

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The first section of the act of 1848 authorizes the mayor and aldermen to issue bonds, under the corporate seal of the city, signed by the mayor and treasurer, in sums not less than one hundred dollars each, to bear such rate of interest, not exceeding eight *per-cent. per annum*, and to be redeemed at such time and upon such terms as were expressed in the bonds; the entire amount issued not to exceed at any one time fifty thousand dollars. The section proceeds: "No bonds shall be issued, but upon an entire concurrence of the board of mayor and aldermen, upon a full attendance of all the members of the board, and when there is no vacancy; which shall be made manifest only by an entry of the order for issuing being made on the minutes of said board, and being signed by each member thereof; nor shall any contract amounting to one hundred dollars, made under any of the provisions of this act, be valid, which is not made under all the restrictions in this section recited." The second section declares the purposes to which the money arising from the sales of the bonds must be appropriated—the securing the right of way, and constructing a canal, around the lower end of the shoals of the Coosa river; and confers on the treasurer authority to sell the bonds at par value. The third section reads: "That taxes arising from assessments on the real estate in the corporate limits of said city, together with the real estate belonging to said corporation, with the rents, issues, and profits thereof, be, and the same are hereby, pledged and appropriated for the final payment of all bonds issued under the provisions of this act."—Pamph. Acts 1847-8, pp. 223-5.

The act of February 1st, 1850, reads: "That the amount of bonds issued under the provisions of the first section of said act may be extended to one hundred thousand dollars, and the money arising from the sale of said bonds may be appropriated, under the supervision and direction of the mayor and aldermen of Wetumpka, for any purpose of internal improvement for the benefit of the citizens of Wetumpka."—Pamph. Acts 1849-50, p. 348.

These statutes were enacted, and the bonds now preferred as claims against the city were issued, while the constitution of 1819 was the fundamental law. That constitution did not inhibit the General Assembly from authorizing municipal corporations to become stockholders in private corporations, and aiding in the construction of railroads, plank-roads, or other improvements, though they extended beyond the corporate limits, or even beyond the State; and the borrowing of money, or the issue of negotiable securities, which were to be paid by municipal taxation, to accomplish such pur-

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poses.—*Stein v. Mobile*, 24 Ala. 591; *Gibbons v. Railroad Company*, 36 Ala. 410.

In *Mayor and Aldermen of Wetumpka v. Winter*, 29 Ala. 651, the action was founded on the breach of the condition of a bond executed by Winter to the mayor and aldermen, by which Winter, in consideration of the bonds of the city, agreed to pay the subscription of the city to the Tallassee Branch of the Central Plank-Road Company, as the company should require payment. The complaint set out the act of February 29th, 1848, and that of February 1st, 1850; and a demurrer to it assigned several causes, none of which seem to have been considered, except that which questioned the validity of the bonds of the city. The complaint averred, with great particularity, the issue of the bonds of the city, under all the restrictions contained in the first section of the act of 1848. The opinion of the court is limited expressly to the facts as disclosed by the record. It was held, that the act of February 1st, 1850, authorized the city to subscribe for the stock in the Tallassee Branch of the Central Plank-Road Company; that the expression "*internal improvements*," as found in that act, did not mean improvements within the city, but works within the State,—improvements of the highways and channels of commerce; and it was the incidental benefits arising from them to the citizens of Wetumpka which the act contemplated.

Without inquiring whether we would concur in this view, if the question was first presented, we adhere to it, so far as it affects any question now involved. The mayor and aldermen, of consequence, had power to subscribe to the stock of the Central Plank-Road Company, and of the Tallassee Branch, and to issue and sell the bonds of the city to pay such subscription. But, in the exercise of the power, they were bound and limited by the provisions of the act of February 29, 1848. The act of February 1, 1850, does not remove or relax any of the conditions, restrictions, or limitations, which were imposed by the act of February 29, 1848. Of the latter act, there is no other change or modification, than in conferring on the mayor and aldermen power to appropriate the money arising from the sale of the bonds of the city, to other purposes than the construction of a canal, and increasing the amount of bonds which could be issued, from fifty to one hundred thousand dollars. Under the acts, no bond could be issued, or, if issued, no bond was valid, unless the order for issuing was made with the entire concurrence of the board of mayor and aldermen, upon a full attendance, when there was no vacancy; which could be made manifest

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only by an entry on the minutes of the board, and being signed by each member thereof.

The power of the General Assembly to confer on the city of Wetumpka this extraordinary power, foreign to the purposes of its original incorporation, the decisions of this and other courts, State and Federal, had sanctioned. Having that power, the General Assembly had as ample power to declare the conditions and limitations upon and under which the city could exercise the power delegated. It had, also, plenary power to declare that, if these conditions and limitations were not observed, the acts and contracts of the city should not be valid; and it had the power to declare what should be the evidence, *the sole and exclusive evidence, of their observance.* The limitations and restrictions imposed, were intended to protect the city from an abuse, or an injudicious exercise of the power conferred. A majority of the board of mayor and aldermen were intrusted with the exercise of the ordinary powers of the corporation, and the evidence of their acts might, in some cases, remain in parol, or be entered on the minutes of the board. If entered there, no particular designation of the individuals concurring, or declining to concur, would be essential. A majority was not intrusted with the power of issuing bonds under these acts. A concurrence of the whole number constituting the board was necessary. The presence of all the members of the board of mayor and aldermen is not necessary in the exercise of the ordinary corporate powers; and though vacancies may occur, the board has all such powers, unless reduced below a quorum for the transaction of business. But the exercise of these powers would not involve the consequences which would follow from an exercise of the extraordinary power these statutes confer. Therefore, the General Assembly cautiously limited the exercise of the power, and, not satisfied with the limitation, proceeded further, and declared, if the observance of the limitation was not manifested in a particular mode, all contracts made, or purporting to be made, in the exercise of the power, should not be valid. Now, courts are bound to take notice of these statutes, of all their terms, and to measure every contract which they are required to enforce, and which is supposed to derive validity from them, by inquiring whether they conform to these terms. Those who enter into such contracts, and claim benefits from them, can not escape the obligation and consequences of the maxim, that every man is presumed to know the law. No representation, no admission, no declaration, made by the officers of the corporation, can absolve from this obligation. As between natural persons, with whom no peculiar relations exist,

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admissions, declarations, or misrepresentations of the law, do not relieve from, or create liability. With the same knowledge of the law, which can be imputed to these officers and agents, those who deal with them are chargeable; and certainly there is no indication in the statutes of a purpose (but there is an expression of a contrary purpose) to invite strangers to rely on the representations of the mayor and aldermen, or of the mayor and treasurer. These limitations are vain and useless—they are a mockery of right and justice, a snare and delusion to the people who reposed upon them, if they are to be evaded upon the pretense, that the bonds now sought to be enforced against the city, though not issued in conformity to them, are in the hands of *bona fide* holders, who have relied upon the acts of the mayor and treasurer in issuing them, and declaring on the face of the bonds that they were issued in conformity to the statutes. There can be no holder of the bonds, who is not charged with knowledge of the statutes; none not deriving title from, and tracing it to the statutes, which are the origin and foundation of his right. The reference in the bond to Rose, to these statutes, directed attention and inquiry to them as the authority for the making of the bond. The reference in the bonds to Smith is very inaccurate, as to the date of the statutes. There was no statute of January 19th, 1839, referring to the city of Wetumpka. But, assuming that was a clerical error, and the act intended was, as his cross-bill in effect avers, the act of February 29, 1848, the reference would charge him with notice of the statutory limitations and conditions. A purchaser of real estate is charged with notice of all that appears on the face of the title-deeds of his vendor, and protection against equities of which these give notice is never afforded him.

If the limitations, or conditions, or restrictions, as they are termed in the statute, are not observed in the making of the contracts it authorizes, it is declared such contracts are not valid. This is but another form of expressing that they are *void*. When contracts are by statute pronounced *void*, they cannot become good in the hands of subsequent holders, though bad faith may not be imputable to such holders, and they may have acquired them for value.—1 Parsons on Notes and Bills, 218; *Saltmarsh v. Tuthill*, 13 Ala. 404; *Anthony v. Jasper County*, 4 Dillon, C. C. 143.

But neither the appellee nor Smith can be regarded as entitled to the immunity and protection afforded the *bona fide* holder of commercial paper. The appellee is the assignee of the judgment in favor of Rose, and from that assignment derives its rights. The assignee of a judgment succeeds

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only to the rights and equities of the assignor—he stands in his place, and is affected by every claim the defendant in the judgment could prefer against him. The contract was made with Rose, and the bond issued and made payable to him. As between the immediate parties to a negotiable instrument (if it could be conceded that was the character of the bond to Rose); not only the consideration is open to inquiry, but it is subject to every defense which could be made against any other instrument. It is only when there is a transfer, a negotiation of the instrument, to another party, between whom and the maker, or prior parties, no privity exists, that an inquiry into the consideration is foreclosed, or defenses are cut off.—1 Dan. Neg. Ins. § 769.

Nor can Smith claim protection as a *bona fide* holder, though the bonds held by him are negotiable instruments. Whatever may be the course of decision elsewhere, the doctrine unequivocally established in this court many years ago, and reaffirmed by repeated decisions, is, that if fraud, or illegality in putting in circulation negotiable paper, or a defense addressed to its consideration, is shown, the *onus* is cast on the holder, claiming protection against such defenses, to prove that in good faith, before maturity, in the usual course of business, upon a valuable consideration, he acquired the paper.—*Ross v. Drinkard*, 35 Ala. 434. No such proof has been made by Smith; and he can stand upon no other ground, than that the original holder of the bonds would have occupied.

There is a plain difference between this case and that large class of cases decided by the Supreme Court of the United States, in which municipal bonds were enforced, though there was fraud or irregularity in their issue, the right of a *bona fide* holder having attached. *First*, the rights of a *bona fide* holder are not, as we have seen, involved. *Second*, it is not fraud, or irregularity merely, in the issue of the bonds. The power to issue them never existed—the facts out of which the power could arise never occurred. No officer of the corporation, no particular person, or special tribunal, was clothed with the power or the duty to ascertain whether the facts had occurred, and, by an expression or declaration, to inform others of their occurrence. There was but one mode of manifesting them, and that mode the statute declares is exclusive. There can be, in principle, no difference between the want of power, and a grant of power upon a condition which is never performed. Until the condition is performed, the power cannot pass. And in this case, until the entire concurrence of all the board of mayor and aldermen, entered on the minutes of the board, signed

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by all, the city was without power to issue these bonds. That was the condition precedent, prescribed clearly and emphatically by the General Assembly; and performance of that condition could be made manifest only by the entry on the minutes, signed by the mayor and aldermen. The mayor and treasurer may have declared that the board unanimously approved the subscriptions to the plank-road companies, and authorized the issue of the bonds, and that the bonds were issued in conformity to the statutes. It was not their province to make the declaration, and it is of no more value as evidence, than the declaration of any other citizens of Wetumpka. It may be founded in truth, but is not the evidence of the fact the statute requires, and declares exclusive.

Another feature, distinguishing the case, is the statutory declaration of the invalidity of the bonds, the restrictions of the statute not having been observed, which brings the case within the doctrine of *Anthony v. Jasper County*, *supra*. There not having been an entry on the minutes of the board of mayor and aldermen, signed by each member, of an order or authority for the issue of these bonds, they cannot be pronounced valid obligations binding the city.

But, it is insisted the judgment at law, against the mayor and aldermen, in favor of Rose, founded on the bond issued to him, estops this defense, so far as the appellee is concerned. The answer abounds with allegations of fraud and collusion in the obtaining of that judgment, which, it is proper to say, are wholly unsupported by evidence. It appears to have been obtained in the regular course of judicial proceedings, and certainly before a court of competent jurisdiction. We have no doubt that, in any proceeding at law for its enforcement, it is conclusive, and that in all courts it entitles Rose, and his transferee, to stand as a judgment creditor of the city, with all the rights which would flow from that relation. The equity of the original bill, however, depends upon the right of the appellee to enforce the pledge and appropriation of the taxes arising from the assessments on real estate made by the city, and of the real estate of the city, made by the third section of the act of 1848. To obtain relief merely as a judgment creditor, there is no ground of equity jurisdiction averred in the original bill—no obstruction to, or inadequacy of legal remedies. The enforcement of the trust created by the statute, to which we have referred, is the exclusive ground upon which the resort of the appellee to a court of equity can be maintained.—*Rice v. Watertown*, 19 Wall.

It is only to the bonds issued under authority of, and in

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conformity to the statutes, that the trust extends. Debts may be contracted by the city, and judgments rendered against it founded on such debts; security for these, the statute did not intend or create. A judgment or decree of a court of competent jurisdiction is conclusive, not only of the subject-matter determined, but of all other matters which could have been litigated and decided. Whether the trust and security afforded by the statute attached to the bond to Rose, was not a matter which could be determined in a court of law. A court of equity only, when the enforcement of the trust was claimed, could determine that question. The validity of the bond, as a debt of the corporation, could have been litigated in the action at law; and it may be conceded that the judgment conclusively determines that question. It does not determine that it is a debt to which the trust of the statute extends; and by no laches of the officers of the corporation can the trust be made to embrace any demand not within its terms.—*Branham v. Mayor, &c. of San Jose*, 24 Cal. 604; *Batchelder v. Taylor*, 11 N. H. 129.

We have not overlooked other questions which have been argued by counsel. They cannot change the results of our deliberations, and it is unnecessary to protract this opinion by a discussion of them.

The decree of the chancellor must be reversed, and the cause remanded, that the Court of Chancery may order a dissolution of the injunction heretofore granted, a settlement of the accounts of the receivers, and the payment of all funds in their hands to the mayor and aldermen, and the restoration of the wharf property to their possession; a restitution to them of all moneys paid to Smith, or to the wharf company, under orders or decrees made in this cause, and a dismissal of the original bill, at the cost of the appellee; and the cross-bill at the cost of Smith.

STONE, J., not sitting.

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ACCOMPLICE.

1. *Examination as to matters criminalizing himself.*—When an accomplice consents to testify as a witness for the State, he can not refuse to answer a question because his answer may criminate himself; but this rule only extends to questions concerning matters about which he has already testified.—*Lockett v. The State*, 5.
2. *How corroborated.*—When a conviction of felony is sought on the testimony of an accomplice, there must be corroborative evidence tending to connect the defendant with the commission of the crime (Code, § 4894); and when there is such corroborative evidence, it is for the jury to decide the effect to which it is entitled.—*Ib.* 5.

ACCOUNT.

1. *Proof of account.*—An account is not documentary evidence, nor governed by the rules which apply to primary and secondary evidence.—*M. & C. Railroad Co. v. Maples*, 601.
2. *Same; from book-entries.*—A witness, testifying to the correctness of an account, may aid his memory by consulting the entries in books, when he himself made them, and had knowledge of their correctness when he made them; but he can not testify to the correctness of an account, as made out from books in his custody and possession, when he did not himself make the entries, and has no knowledge of the matters of account except as derived from the books.—*Ib.* 601; *Acklen's Executor v. Hickman*, 494.

ACTION.

1. *When action lies against judicial officer.*—A judicial officer, or person invested with judicial power, is not liable to a civil action for damages, at the suit of a person aggrieved by the exercise of that power in any particular case within the pale of his jurisdiction, though malice, or error, or both combined, may have entered into his decision.—*Woodruff v. Stewart*, 206.
2. *Same; jurisdiction defined.*—Jurisdiction is the power to hear and determine a cause, and it exists whenever an officer or tribunal is by law clothed with the capacity to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power.—*Ib.* 206.
3. *When action lies for money paid by mistake.*—Money paid under a mistake of a material fact may be recovered in an action on the common counts in assumpsit, although the person making the payment had in his power the means of ascertaining the facts, and was guilty of negligence in not ascertaining them; but such negligence on his part is a fact for

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- the consideration of the jury, in determining whether his alleged ignorance was real or feigned.—*Young & Son v. Lehman, Durr & Co.*, 519.
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 5. *Same.*—The acceptor of a bill of exchange is chargeable with a knowledge of the drawer's signature, and can not recover money paid on a forged signature; but, if a material alteration is made in the draft, after it has been signed by the drawer, and the drawee is not guilty of any negligence in the matter, he may recover money paid on it in ignorance of the alteration; yet not against the drawer, unless negligence can be attributed to the latter.—*Ib.* 519.
 6. *Action between innocent sufferers by wrongful act of third person.*—As between persons equally innocent, one of whom is bound to know and act upon his knowledge, while the other has no means of knowledge, the latter will not be burdened with a loss, in exoneration of the former; and when one of two innocent persons must suffer by the tortious act of a third, he must bear the consequences who gave the wrongdoer the means of doing the wrongful act.—*Ib.* 519.
 7. *Same; letter of credit; money paid on forged bill of lading.*—A letter authorizing the person to whom it is addressed to draw on the writers for any cotton he may buy in a named city, provided the draft is accompanied by a bill of lading of the cotton, and does not in amount exceed three-fourths of the market price of the cotton, binds the writers, as in favor of any person who, on the faith of the letter, advances the money to buy the cotton, for a draft which conforms to the prescribed conditions, although the accompanying bill of lading is not genuine; and having paid the draft, they can not recover back the money, on discovering the fraud in the bill of lading.—*Ib.* 519.
 8. *Action against bank for moneys deposited and collected during late war.*—A customer of an incorporated bank, who deposited with it for collection, at different times, between November, 1861, and April, 1862, notes and drafts on third persons; giving no instructions as to the kind of funds to be received, and making no demand until after the close of the war,—can not recover, under the common counts, more than the value of Confederate currency when the demand was made.—*Henry v. Northern Bank of Alabama*, 527.
 9. *Action by plaintiffs in attachment, for wrongful second levy, whereby sureties on replevin bond are discharged.*—When an attachment has been levied on personal property, which is replevied, and a second attachment is afterwards levied on it, under which it is taken from the possession of the sureties, whereby they are discharged, the plaintiffs in the first attachment have their remedy against the sheriff, for his authorized act in taking the property under the junior attachment, and may, possibly, maintain an action for money had and received against the plaintiffs in that attachment.—*Cordaman v. Malone*, 556.
 10. *When heir may maintain action for trespass on lands.*—The heir may maintain an action at law for a trespass on lands descended to him, although the administrator had, prior to the commission of the trespass, obtained an order to sell them for the payment of debts, but had never sold them under the order, nor otherwise exercised any of his statutory powers over them, and had resigned his administration before the commencement of the action.—*Calhoun v. Fletcher*, 574.
 11. *Abatement and revivor of action.*—By statutory provision (Code, § 2908), no civil action abates by the death or other disability of a party, plaintiff or defendant, when the cause of action survives; but the action may be revived, on motion, within eighteen months after the occurrence of the disability.—*Evans v. Welch*, 250.
 12. *Same, in ejectment, or statutory action.*—In ejectment, or the corresponding

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statutory action, if the sole plaintiff dies, or if one of several plaintiffs dies, the revivor may be in the name of his personal representative alone, or in the names of his heirs or devisees, or in the names of both the personal representative and the heirs or devisees, to be determined by the extent of the recovery sought—whether the land only, or also damages accruing prior and subsequent to the death of the original plaintiff.—*Ib.* 250.

13. *Limitation of revivor; amendment of complaint.*—In whatever form the revivor is sought, it must be made, or a motion to revive must be entered, within eighteen months after the death of the party; and if not made within that time, the action abates as to the interest of the deceased; and the defect can not be afterwards cured by an amendment of the complaint, bringing in the parties on whom that interest has devolved. *Ib.* 250.

AGENCY.

1. *How proved.*—Agency can not be proved by the mere declarations of the person assuming to act as agent, though it may be inferred from his previous employment in similar acts, or from subsequent acquiescence. *Womack v. Bird*, 500.
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3. *Declarations of agent; admissibility against principal.*—In an action against an incorporated bank, the declarations or admissions of its president can not be received to establish a liability against it.—*Henry & Co. v. Northern Bank of Ala.*, 527.
4. *Same.*—The declarations or statements of an agent, having authority only to demand and receive from the defendant the property sued for, made to third persons, after a refusal to deliver by the defendant, in derogation of the title of plaintiff, his principal, are not competent evidence against plaintiff.—*Bynum v. Southern Pipe and Pump Co.*, 462.
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ALIENS.

1. *Alien enemy.*—In an action on the common counts, where the plaintiff relies for a recovery on an account stated since the close of the late war, and partial payment or acknowledgment made since that time, no question of alien enemy can arise, although the original consideration of the account or promise accrued during the war, and the parties were at that time under different and opposing flags.—*Acklen's Executor v. Hickman*, 494.

AMENDMENT.

1. *Of complaint.*—In ejectment, or the corresponding statutory action, if the sole plaintiff dies, or if one of several plaintiffs dies, and the action is not revived within eighteen months after his death (Code, § 2098), it abates as to his interest; and the defect can not be afterwards cured by an amendment of the complaint, bringing in the parties on whom that interest has devolved.—*Evans v. Welch*, 250.
2. *Statute of limitations to amended complaint.*—Where the original complaint is founded on a sheriff's official bond, and assigns as a breach the non-payment of a decree rendered against him as administrator by virtue of his office; and an additional count is filed, by leave of the court, as an

AMENDMENT—*Continued.*

amendment to the complaint, which counts on the probate decree only, and makes no reference to the bond ; the amendment does not present new matter, to which the statute of limitations can be pleaded.—*Stringer v. Waters*, 361.

3. *Amendment of judgment on error.*—In *scire facias* against bail on a forfeited recognizance, if the record shows that the *scire facias* was returned executed on all the recognizors but one, and judgment final was taken against all, without two returns as to the one not found, this court will amend the judgment by discontinuing the proceeding as to him, if the record shows no other error.—*Hunt v. The State*, 196.
4. *Same ; by correcting error in calculation of interest.*—On appeal from a judgment by *nil dicil*, in an action on a promissory note, a clerical misprision in the calculation of interest, being amendable *nunc pro tunc*, on motion, in the court below, will be amended by this court at the cost of the appellant, and the amended judgment affirmed.—*Smith v. Kennedy*, 334.

As to amendments in chancery, see CHANCERY.

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ASSIGNMENT

1. *Of mortgage and secured debt, by heirs (or devisees) of mortgagee.*—A conveyance of the mortgaged premises, by the heirs (or devisees) of the deceased mortgagee, to the wife of the mortgagor, operates in equity as an assignment of the secured debt ; and their assignment of the secured debt to her, whether they have the legal title or not, passes an equity against all the world, except creditors whose rights are affected ; a stranger can not be heard to question the validity and effect of such assignment.—*Cook v. Parham & Blunt*, 456.
2. *Of note for purchase-money of land.*—A vendor's equitable lien on land, for the unpaid purchase-money, does not pass to an assignee or transferee of the note given for the purchase-money, when the transfer does not involve the vendor in liability for the ultimate payment of the note, but secures to him all the benefits of a payment.—*Barnett v. Riser's Executors*, 427.
3. *Assignment of judgment.*—The assignee of a judgment succeeds only to the rights of his assignor, and can not claim protection against equities which were binding on his assignor.—*Mayor of Wetumpka v. Wetumpka Wharf Co.*, 612.

ATTACHMENT.

1. *Levy of attachment on lands ; death of defendant before judgment.*—When an attachment is levied on lands, and the defendant dies before judgment, the lien created by the levy is thereby destroyed ; and though the action may be revived, and prosecuted to judgment against his personal representative, the lien is gone, and the revivor does not affect the rights of heirs or devisees.—*Phillips v. Ash's Heirs*, 414.
2. *Same ; lien not enforced in equity.*—The plaintiff cannot, in such case, by bill in equity subject the lands to the satisfaction of his debt, since a court of equity can not aid or supply the defects of a statutory remedy. (The case of *McClellan v. Lipscomb*, 56 Ala. 255, was not intended to intimate that such a bill could be maintained.)—*Ib.* 414.
3. *Lien under levy more than four months before bankruptcy.*—An adjudication of bankruptcy does not destroy or affect the lien of an attachment levied more than four months prior thereto : the debtor's title to the property passes to the assignee as he himself held it—that is, subject to the lien of the attachment ; and the court in which the attachment suit is pending may, notwithstanding the bankruptcy, proceed with the suit, and

ATTACHMENT—Continued.

- enforce the lien by any appropriate process which does not involve a personal judgment against the bankrupt.—*Martin v. Lile*, 406.
4. *Allowance of homestead exemption to bankrupt, in lands subject to attachment lien.*—The allowance of a homestead exemption by the District Court in bankruptcy, in lands which, though included in the bankrupt's schedule, were subject to the lien of an attachment levied on them more than four months prior to the adjudication in bankruptcy, and which were afterwards sold under the judgment in the attachment suit, operates only on such claim and interest in the land as passed to the assignee, and can not prevail against a purchaser under the judgment in attachment.—*Ib.* 406.
 5. *Replevin bond; to whom payable, and who may sue on.*—A replevin bond, in an attachment case, should be made payable to the plaintiff in attachment (Code, § 3289), and not to the officer by whom the writ is levied; and if made payable to the officer, the plaintiff can not maintain an action on it in his own name.—*Agnew v. Leath*, 345.
 6. *Lien of attachment, as affected by replevin bond.*—The levy of an attachment on personal property creates a lien, and places the property in the custody of the law; and the execution of a replevin bond neither destroys nor impairs this lien.—*Corlaman v. Malone*, 556.
 7. *Levy of junior attachment after replevy.*—When the property has been replevied, it is nevertheless still in the custody of the law, and the sheriff has no authority to levy a junior attachment on it.—*Ib.* 556.
 8. *Remedy of sureties on replevin bond, for wrongful second levy.*—If a junior attachment is levied on the property after it has been replevied, the sureties on the replevin bond may interpose a claim, and try the right of property under the statute; and if the sheriff refuses to entertain the claim, on the ground that he has returned the attachment papers to court, the sureties may, by mandamus, compel him to receive and file their affidavit and bond.—*Ib.* 556.
 9. *Discharge of sureties on replevin bond.*—When the property is taken from the sureties on the replevin bond, under a junior attachment, and delivered to the plaintiffs in that attachment, by whom it is removed and sold, the sureties on the replevin bond are discharged from their liability, and may supersede and quash a summary execution issued against them.—*Ib.* 556.
 10. *Remedy of plaintiffs in first attachment.*—In such case, the plaintiffs in the first attachment have their remedy against the sheriff, for his unauthorized act in taking the property under the junior attachment, and may, possibly, maintain an action for money had and received against the plaintiffs in that attachment.—*Ib.* 556.
 11. *Bond with blank penalty; admissibility of parol evidence.*—An action cannot be maintained on an attachment bond, the penalty of which is left blank; nor can the defect be remedied by parol evidence as to what sum should have been specified.—*Copeland & Brantley v. Cunningham*, 394.
 12. *Attorney's fees as damages.*—In an action on an attachment bond, conditioned to "prosecute the attachment to effect, and pay the defendant all such damages as he may sustain from the wrongful or vexatious suing out of such attachment" (Code, § 3256), attorney's fees for services rendered in bringing the action can not be recovered. (Overruling *Burton v. Smith*, 49 Ala. 293.)—*Ib.* 394.
 13. *Garnishment of debt due for taxes.*—On grounds of public policy, a judgment creditor of a municipal corporation can not, by process of garnishment, reach and subject funds accruing to it by taxation, either while in the course of collection by suit, or after they have been paid into its treasury. (Overruling *Smoot v. Hart*, 33 Ala. 69.)—*Underhill v. Calhoun*, 216.

ATTORNEY AT LAW.

1. *Appointment of, and appearance by.*—An infant can not appoint an attorney; hence, when an infant defendant to a bill has not been properly

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- brought in as a party, pleadings signed by an attorney, though purporting to act as "solicitor for all the defendants," do not bring the infant into court, nor amount to an appearance by him.—*McIntosh v. Atkinson*, 241.
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 3. *Attorney's fees as damages.*—In an action on an attachment bond, conditioned to "prosecute the attachment to effect, and pay the defendant all such damages as he may sustain from the wrongful or vexatious suing out of such attachment" (Code, § 3256), attorney's fees for services rendered in bringing the action can not be recovered. (Overruling *Burton v. Smith*, 49 Ala. 293.)—*Copeland & Brantley v. Cunningham*, 394.
 4. *Same.*—When attorney's fees may be recovered as damages, in an action on a special supersedeas bond, see *Steele v. Tutwiler*, 368; *Drake v. Webb*, 596.

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BAILMENT. See COMMON CARRIERS.

BANKRUPTCY.

1. *Lien of attachment levied more than four months before.*—An adjudication of bankruptcy does not destroy or affect the lien of an attachment levied more than four months prior thereto: the debtor's title to the property passes to the assignee as he himself held it—that is, subject to the lien of the attachment; and the court in which the attachment suit is pending may, notwithstanding the bankruptcy, proceed with the suit, and enforce the lien by any appropriate process which does not involve a personal judgment against the bankrupt.—*Martin v. Lile*, 406.
2. *Homestead exemption; allowance by District Court in bankruptcy, in lands subject to attachment lien.*—The allowance of a homestead exemption by the District Court in bankruptcy, in lands which, though included in the bankrupt's schedule, were subject to the lien of an attachment levied on them more than four months prior to the adjudication in bankruptcy, and which were afterwards sold under the judgment in the attachment suit, operates only on such claim and interest in the land as passed to the assignee, and can not prevail against a purchaser under the judgment in attachment.—*Ib.* 406.
3. *Homestead exemption of bankrupt.*—Since the title to the exempt property of a bankrupt does not vest in his assignee (Rev. Stat. U. S. § 5045), it would seem that he is not entitled to a conveyance of his homestead by the assignee.—*Farley, Spear & Co. v. Whitehead*, 295.
4. *Same; admissibility of record or judgment as evidence against third person.* In ejectment by a purchaser at a sale made by an assignee in bankruptcy, to recover lands which the bankrupt claims as his homestead exemption, an order of the bankrupt court, rendered after the commencement of the suit, *nunc pro tunc* (but not stating of what time), on the *ex parte* petition of the bankrupt; which recites that "it appears to the court that a homestead exemption was regularly set aside and assigned to the said bankrupt, but there is no record evidence to protect his title," and therefore orders the assignee of his estate to "execute to said bankrupt a conveyance, *nunc pro tunc*, of the following real estate, as his homestead exemption,"—is not admissible evidence against the plaintiff, when offered without the petition, the action of the court assigning the homestead, or other judicial proceeding had in connection with it.—*Ib.* 295.
5. *Composition with creditors; requisites of plea.*—A composition between a bankrupt and his creditors, when approved by the court, is binding and conclusive only on the creditors whose names and address, with the amount of their debts, are included in the statement furnished by the

BANKRUPTCY—*Continued.*

bankrupt to the creditors' meeting (Rev. Stat. U. S. § 5103); and when such composition is pleaded by the bankrupt, in bar of a subsequent action by a creditor, the plea must aver that the plaintiff's name, &c., were included in the defendant's statement.—*Shulman, Goetter & Weil v. Graves*, 402.

BANKS.

1. *Liability of bank for moneys deposited and collected during late war.*—A customer of an incorporated bank, who deposited with it for collection, at different times, between November, 1861, and April, 1862, notes and drafts on third persons; giving no instructions as to the kind of funds to be received, and making no demand until after the close of the war, can not recover, under the common counts, more than the value of Confederate currency when the demand was made.—*Henry & Co. v. Northern Bank of Alabama*, 527.
2. *Declarations of president; admissibility against bank.*—In an action against an incorporated bank, the declarations or admissions of its president can not be received to establish a liability against it.—*Ib.* 527.

See, also, CORPORATIONS, 1, 2, 3.

BILL OF EXCEPTIONS.

1. *Contents of.*—The presiding judge is not bound to sign a bill of exceptions, tendered for his signature, unless it truly states "the point, charge, opinion, or decision, wherein the court is supposed to err" (Code, § 3108), and also sets forth "such a statement of the facts as is necessary to make it intelligible."—*Ex parte Mayfield*, 203.
2. *Signing after adjournment of court, "by consent or agreement of counsel in writing."*—In a criminal case, the solicitor only—the officer whose duty it is to prosecute in behalf of the State—can consent in writing that a bill of exceptions may be signed by the presiding judge after the adjournment of the court for the term (Code, § 3113); and this court will not establish a bill, which the presiding judge below refused to examine or sign, on objection by the solicitor, although the associate counsel for the prosecution consented in writing that it might be signed after the adjournment of the court. (STONE, J., *dissenting*.)—*Ib.* 203.
3. *When allowable, or proper.*—When the judgment entry, in a case of felony, recites that the defendant was asked by the court if he had anything to say in bar or preclusion of judgment, the recital imports absolute verity, and testimony can not be received to impeach it; and motion being made to correct the entry in this particular, supported by affidavits, and overruled by the court on the evidence adduced, this court can not revise its ruling on bill of exceptions.—*Gray v. The State*, 67.
4. *General exception to charge partly correct.*—A general exception to a charge, separable into two or more distinct propositions, will not avail, if any one of those propositions be correct.—*Ib.* 67.
5. *Exceptions to charges given or refused.*—Exceptions to the rulings of the court below, in the matter of charges given or refused, will not be considered by this court, when the error complained of "was not so specified as to call the attention of the judge and the adverse counsel to the particular matter supposed to be injurious to the party excepting." *Hardin v. The State*, 39.
6. *Same.*—A recital in the bill of exceptions that the defendant "duly excepted to charges numbered 1, 2, and 4," does not show a separate exception to each charge, but is a general exception to them all, and can not avail unless each of them is erroneous.—*Mayor, &c., of Birmingham v. Ramsey & Co.*, 352.
7. *General exception to charge.*—A general exception to an entire charge, consisting of several distinct propositions, may be overruled entirely :

BILL OF EXCEPTIONS—*Continued.*

- the objectionable clause or portion should be specified and clearly pointed out, so that the attention of the court and the opposing counsel may be drawn to the supposed error.—*Ib.* 266.
8. *Exception to additional charge to jury.*—An exception to additional instructions to the jury, given by the court on their returning an incomplete verdict, must be taken before the jury retire again, and comes too late after they have brought in their final verdict.—*Bynum v. So. Pipe and Pump Co.*, 462.
 9. *Exception to exclusion of evidence.*—An exception to the exclusion of evidence can not be sustained, when the nature or substance of the excluded evidence is not so set out as to show error on the part of the court, or prejudice to the party excepting.—*Ib.* 462.
 10. *Exception to evidence; certainty requisite in.*—Where the bill of exceptions sets out evidence, some of which is inadmissible, in one continuous sentence, and then adds, "The State objected to this testimony as it was offered, and the court sustained each objection, and the defendant separately excepted;" the exception is wanting in the requisite definiteness and certainty.—*Boswell v. The State*, 307.

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *When action lies for money paid on forged instrument.*—A person who discounts a negotiable instrument which is forged, and to which he is not a party, may recover back the money so paid; but, when he is a party to the instrument, and stands in such a relation to the other parties that he ought to know whether it is genuine or not, he can not recover money paid on it.—*Young & Son v. Lehman, Durr & Co.*, 519.
2. *Same.*—The acceptor of a bill of exchange is chargeable with a knowledge of the drawer's signature, and can not recover money paid on a forged signature; but, if a material alteration is made in the draft, after it has been signed by the drawer, and the drawee is not guilty of any negligence in the matter, he may recover money paid on it in ignorance of the alteration; yet not against the drawer, unless negligence can be attributed to the latter.—*Ib.* 519.
3. *Same; letter of credit; money paid on forged bill of lading.*—A letter authorizing the person to whom it is addressed to draw on the writers for any cotton he may buy in a named city, provided the draft is accompanied by a bill of lading of the cotton, and does not in amount exceed three-fourths of the market price of the cotton, binds the writers, as in favor of any person who, on the faith of the letter, advances the money to buy the cotton, for a draft which conforms to the prescribed conditions, although the accompanying bill of lading is not genuine; and having paid the draft, they can not recover back the money, on discovering the fraud in the bill of lading.—*Ib.* 519.
4. *Transfer of bills, notes, or bonds; rights of transferee.*—Negotiable or commercial paper is transferrable by delivery, and a holder thereof may, before dishonor, transfer to a *bona fide* purchaser for value a title freed from all infirmity, and which will prevail over that of the true owner, although he himself obtained it fraudulently, or feloniously; but, as to all other paper, an assignee or transferee succeeds only to the rights and title of his assignor or transferor.—*Blackman v. Lehman, Durr & Co.*, 547.
5. *What paper is negotiable, or transferrable by delivery.*—A bill of exchange, promissory note, or other instrument, to be negotiable paper, or transferrable by delivery, must be payable absolutely and unconditionally, and not on a contingency which may never happen; and this must depend upon its terms at the time it is made: if, when it is made, the payment is to depend on a condition, contingency, or uncertain event, the subsequent happening of that event or contingency will not change its character.—*Ib.* 547.
6. *Requisites of negotiable paper.*—Negotiable paper must also be certain as to the payee: though it is not necessary that the payee should be

BILLS OF EXCHANGE, AND PROMISSORY NOTES.—*Continued.*

- named, the instrument must on its face afford an indication or designation by which he can be ascertained.—*Ib.* 547.
7. *Same*.—Each State has the undoubted legislative right and power to enlarge or diminish the character of paper which shall be negotiable; and under the laws of Alabama, passed in the exercise of this power, only bills of exchange and promissory notes payable in money at a bank or banking-house, or at a certain place therein designated, and bank-notes intended to circulate as money, are subject to the commercial law; while it is expressly declared by the statute (Code, § 2098), that all bonds, bills, or notes (except those issued to circulate as money), when "payable to anything or bearer, or to any fictitious person or bearer, or to bearer only, must be construed as payable to the person from whom the consideration moved," and, consequently, can only pass by his indorsement.—*Ib.* 547.
 8. *Negotiable paper; rights of holder, and burden of proof*.—The doctrine has been long settled in this court, as to negotiable paper, that when fraud or illegality in putting it in circulation is shown, or any defense addressed to its consideration, the *onus* is cast on the holder to prove that he acquired it in good faith, before maturity, upon a valuable consideration, and in the usual course of business.—*Mayor of Wetumpka v. Wetumpka Wharf Co.*, 611.
 9. *Conditional note*.—Where a promissory note, given in consideration of the payee's interest in a contract with the United States for carrying the mail on a specified route, contains the express conditions, "that said route is not abolished, nor the pay by the United States diminished"; the failure of the principal contractor, under whom the payee of the note derived his interest in the contract, to pay over to the maker his proportion of the compensation received from the United States, is no defense to an action on the note.—*Blackman v. Dowling*, 304.

BONDS.

1. *Attachment bond; blank penalty*.—An action can not be maintained on an attachment bond, the penalty of which is left blank; nor can the defect be remedied by parol evidence as to what sum should have been specified.—*Copeland & Brantley v. Cunningham*, 394.
2. *Same; damages*.—In an action on an attachment bond, conditioned to "prosecute the attachment to effect, and pay the defendant all such damages as he may sustain from the wrongful or vexatious suing out of such attachment" (Code, § 3256), attorney's fees for services rendered in bringing the action can not be recovered. (Overruling *Burton v. Smith*, 49 Ala. 293)—*Ib.* 394.
3. *Replevin bond; to whom payable, and who may sue on*.—A replevin bond, in an attachment case, should be made payable to the plaintiff in attachment (Code, § 3289), and not to the officer by whom the writ is levied; and if made payable to the officer, the plaintiff can not maintain an action on it in his own name.—*Agnew v. Leath*, 345.
4. *Same; remedy of sureties for wrongful second levy*.—If a junior attachment is levied on the property after it has been replevied, the sureties on the replevin bond may interpose a claim, and try the right of property under the statute; and if the sheriff refuses to entertain the claim, on the ground that he has returned the attachment papers to court, the sureties may, by *mandamus*, compel him to receive and file their affidavit and bond.—*Cordaman v. Malone*, 556.
5. *Same; discharge*.—When the property is taken from the sureties on the replevin bond, under a junior attachment, and delivered to the plaintiffs in that attachment, by whom it is removed and sold, the sureties on the replevin bond are discharged from their liability, and may supersede and quash a summary execution issued against them.—*Ib.* 556.
6. *Special supersedeas bond; condition of, and what damages may be recovered*.—A special bond, executed by the defendant in a statutory action of eject-

BONDS—*Continued.*

ment, on appeal from a judgment for the plaintiff for the possession of the land, with damages and costs, conditioned that he "shall prosecute said appeal to effect, and pay and satisfy such judgment as the Supreme Court may render in the case" (Code, §§ 3927-28),—is fatally defective to supersede the judgment for the land; and the judgment being affirmed on the appeal, and the costs and damages paid, an action can not be maintained on the bond, to recover the rents of the land pending the appeal, or attorneys' fees for services rendered on the appeal. (BRICKELL, C. J., dissenting.)—*Steele v. Tutwiler*, 368.

7. *Same.*—On appeal from a decree in chancery, which ordered a fund in court to be distributed equally among five claimants, two of whom claimed the whole fund; a special *supersedeas* bond being required by the chancellor (Code, § 3928), from any claimant who desired to appeal, conditioned to "prosecute the appeal to effect, and pay such costs and damages as the other parties to the cause may sustain by reason of such appeal, if the said decree is affirmed; the decree being affirmed, and an action at law brought on the bond; held, that the plaintiff was entitled to recover, as damages, interest on his proportionate part of the money in the hands of the register, during the pendency of the appeal, and a reasonable attorney's fee for services rendered on the appeal. *Drake v. Webb*, 596.
8. *Tax-collector's official bond; liability of sureties.*—The general law of 1868, regulating elections, required a tax-collector to be elected, in each county, on the first Tuesday after the first Monday in November, 1871, "and every three years thereafter," but did not expressly declare when their term of office should begin or end. The subsequent statute of December 17, 1873, "relating to the term of office of the several tax-collectors," after providing that collectors thereafter elected should enter on the discharge of their duties on the second Monday in April next succeeding their election, further enacted "that the term of office of the several tax-collectors now in office shall continue until the second Monday in April, 1875; provided, that such tax-collectors shall execute bonds, with sufficient sureties, in the form now prescribed by law, for the faithful discharge of their duties as such during their respective terms of office as hereby extended." Held, that the sureties on the official bond of a collector who was elected in 1871, and who did not give a new bond under the act of 1873, were not liable for a default of their principal committed during the interval between November, 1874, and April, 1875. (BRICKELL, C. J., dissenting, held that the sureties were liable under the general law declaring the legal effect of official bonds [Code, § 179], which declares that an official bond is obligatory on the principal and his sureties, "for any breach of the condition during the time the officer continues in office, or discharges any of the duties thereof," and "for the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond."—*Brewer v. King's Sureties*, 511.
9. *Bonds of corporation; negotiability of.*—The bonds of a corporation, public or private, if issued by authority, and possessing in themselves the requisites of negotiable paper, are, after some vacillation of judicial decision, now recognized as on an equality with bank-notes, bills of exchange, and promissory notes; and the corporate seal does not affect their negotiability, neither conferring nor destroying that quality. *Blackman v. Lehman, Durr & Co.*, 547.
10. *Municipal bonds of Troy, issued in aid of Mobile and Girard Railroad.*—The bonds issued by the city of Troy in aid of the Mobile and Girard Railroad, under the authority of the special statute approved December 8th, 1868 (Sess. Acts 1868, pp. 395-6), are not negotiable paper, because on their face they are made payable on a contingency which might never happen—that is, the completion of the railroad to Troy; and also because they are payable to bearer only. Not being negotiable, the title to such bonds can not pass by delivery, nor, as against the real owner, otherwise than by his indorsement or assignment.—*Ib.* 547.

BONDS—Continued.

11. *When trover lies for conversion of bond.*—The owner of a non-negotiable bond may maintain an action for its conversion against a person who obtained it through an unauthorized transfer by his agent or bailee, and who refuses to deliver it on demand.—*1 b. 547.*
12. *Municipal bonds of Wetumpka, in aid of Central Plank-Road Company.*—The act approved February 29, 1848 (Sess. Acts 1847-8, pp. 223-5), authorized the corporate authorities of the city of Wetumpka to issue its bonds, not exceeding \$50,000 at any one time, and to appropriate the money arising from their sale to securing the right of way, and constructing a canal, around the lower end of the shoals of the Coosa river; and the amendatory act approved February 1st, 1850 (Sess. Acts 1849-50, p. 348), extended the amount to \$100,000, and authorized the money to be appropriated, under the supervision of the mayor and aldermen. "for any purpose of internal improvement for the benefit of the citizens of Wetumpka." In the case of *Mayor and Aldermen of Wetumpka v. Winter* (29 Ala. 651), this court decided that the said act of 1850 authorized the city to subscribe for stock in the Tallassee Branch of the Central Plank-Road Company; and the court now adheres to that decision, so far as it affects the questions involved in the present case. But the said act of 1848, by its 1st section, expressly declared: "No bond shall be issued, but upon an entire concurrence of the board of mayor and aldermen, upon a full attendance of all the members of the board, and when there is no vacancy; which shall be made manifest only by an entry of the order for issuing being made on the minutes of the board, and signed by each member thereof; nor shall any contract amounting to one hundred dollars, made under any of the provisions of this act, be valid, which is not made under all the restrictions in this section recited." These limitations and restrictions were not relaxed, nor in any manner modified, by the subsequent act of 1850; and they are applicable to all bonds issued under that act.—*Mayor of Wetumpka v. Wetumpka Wharf Co., 611.*
13. *Same; when purchaser is chargeable with notice of such restrictions.*—A purchaser of a bond issued under the said act of 1850, and reciting on its face that it was so issued, is chargeable with notice of these restrictions and conditions, and can not claim protection as an innocent holder, although the bond also recites that it was issued in conformity with the statute.—*Id. 611.*

BURGLARY. See CRIMINAL LAW, 21-28.

CARRYING CONCEALED WEAPONS.

See CRIMINAL LAW, 29-35.

CERTIORARI.

1. *At common law.*—A *certiorari*, at common law, was a revisory remedy, intended only for the correction of errors of law apparent on the record; and was not a substitute for an appeal, nor allowed for the correction of errors of fact, which were properly revisable on appeal.—*Dean v. The State, 153.*
2. *Under statute.*—In this State, a party has the right by statute to sue out a *certiorari*, to remove a judgment rendered against him by a justice of the peace, into the Circuit or City Court, when the right of appeal has been lost, without fault on his part, by lapse of time; and the cause is tried *de novo* in that court, without regard to the regularity of the proceedings before the justice, or the sufficiency of the petition for the *certiorari*. But the statute applies only to civil causes, and there is no statute which gives a *certiorari* in a criminal case, to remove a judgment rendered by a justice of the peace.—*Id. 153.*

CHANCERY.

I. JURISDICTION, AND GENERAL PRINCIPLES.

1. *Attachment; when equity will not enforce lien.*—A court of equity can not aid or supply the defects of a statutory remedy. Therefore, when an attachment has been levied on lands, and the defendant dies before judgment, whereby the lien is gone; the plaintiff can not, by bill in equity, subject the lands to the satisfaction of his debt, after reviving and prosecuting his action to judgment against the personal representative.—*Phillips v. Ash's Heirs*, 414.
2. *When simple-contract creditor may come into equity.*—A court of equity, in the exercise of its original jurisdiction, would not interfere at the instance of a creditor by simple contract only, to set aside a deed fraudulent as to creditors, or to subject property fraudulently conveyed by the debtor; but this rule is now changed by the statute (Code, § 3886), which provides that “a creditor without a lien may file a bill in chancery to subject to the payment of his debt any property which has been fraudulently transferred, or attempted to be fraudulently conveyed by his debtor.”—*Evans v. Welch*, 250.
3. *Lien under creditor's bill.*—On the filing of such a bill by a simple-contract creditor, he acquires a lien on the property which he seeks to reach and condemn, at least from the service of process; and if the suit is prosecuted to a final decree without laches, this lien will prevail against a purchaser from either the debtor or his grantee pending the suit.—*Ib.* 250.
4. *Contest of probate of will in equity.*—If the application for probate of a will is not contested in the Probate Court, but the heirs or distributees afterwards seek to set aside the probate by bill in equity (Code, § 2336), which is a statutory substitute for probate in solemn form, the character of the proceeding is not changed so far as the estate is concerned, though it is an adversary suit between the parties claiming under and against the will.—*Kumpe and Wife v. Coons*, 448.
5. *Decedent's estate; equitable relief to heirs or devisees, against judgment on note given by administrator under statutory power.*—When an order is granted by the Probate Court, authorizing an executor or administrator to give a note binding on the decedent's estate (Code, § 2432), although the petition is substantially defective, the order being void, and a judgment rendered on the note being also void, the heirs or devisees can not maintain a bill in equity to enjoin a sale under it; and if the petition was sufficient, and they had due notice of it, they can not have equitable relief against the judgment, in the absence of fraud in the procurement of the order, or something equivalent to it; but, if the petition was sufficient, and they in fact had no notice of the proceeding, a court of equity will, at their instance, perpetually enjoin a sale of the property of the estate under a judgment on the note given by the administrator, on averment and proof that the debt for which the note was given was not, within the terms of the statute, a proper charge against the estate.—*Wilburn & Co. v. McCalley*, 436.
6. *When equity will enjoin sale under power in mortgage.*—A court of equity will enjoin the execution of a power of sale in a mortgage, at the instance of a purchaser of the property, who bought subject to the mortgage, when it clearly appears that the power is perverted from its legitimate purpose, to oppress the purchaser, or to aid others in obtaining an unconscionable advantage over him; as where the mortgagee colludes with third persons, who are attempting to subject the lands to an alleged outstanding vendor's lien, to prevent the purchaser from successfully defending that suit, the litigation casting a cloud on his title, and preventing him from raising money on the property to pay off the mortgage debt, and thereby force him into a settlement or compromise of the asserted vendor's lien,—the sale will be enjoined until the termination of the vendor's suit.—*Struve v. Childs*, 473.
7. *Reformation of written instrument; when decreed.*—A court of equity will reform a written instrument, on the ground of mistake, only on clear

CHANCERY—*Continued.*

and satisfactory evidence of the mistake as alleged : in the absence of such evidence, the writing remains the sole expositor of the agreement of the parties.—*Hinton v. Citizens' Mutual Insurance Co.*, 488.

8. *Chancellor's authority in vacation; when prohibition lies.*—The times and places of holding the several Chancery Courts, and the duration of the terms of the court, being prescribed by law, the chancellor can not hold court at any other time or place, nor exercise any judicial functions in vacation, except as specially authorized by statute, or by the rules of practice prescribed by this court under the power vested in it by law ; and any improper exercise, or attempted exercise by him, of such judicial functions in vacation, would be controlled by prohibition issued from this court.—*Ex parte Branch & Co.*, 383.

II. PLEADING AND PRACTICE.

9. *Where bill must be filed.*—When the defendants reside in this State, and the suit does not relate to real estate, nor seek to enjoin proceedings at law, a bill in chancery can only be filed in the district in which a material defendant resides.—*Campbell v. Crawford*, 392.
10. *Same; how objection must be taken, if not filed in proper district.*—When a bill is filed in a chancery district which has not jurisdiction of the case, and the defect appears on the face of the bill, the objection may be taken by demurrer, or by motion to dismiss, if it has not been waived ; but, when it does not so appear, a plea, in the nature of a plea in abatement, is proper.—*Ib.* 392.
11. *Same; when no court is held in proper district.*—A bill in equity can not be filed in Sumter county, against a resident citizen of Washington county, merely because no time may have been fixed by law for holding the court in the latter county.—*Ib.* 392.
12. *Service of process on infants.*—When infants are joined with their father, as defendants to a bill in chancery, the rule of practice (No. 23) requires that the service of process shall be made upon their father, for them, whether they be under or over fourteen years of age ; and the service of process upon them personally, being unauthorized, is not sufficient to bring them into court.—*McIntosh v. Atkinson*, 241.
13. *Appointment of guardian ad litem for infant.*—Until infants are properly brought into court, by the service of process according to the rules of practice, the appointment of a guardian *ad litem* for them is irregular, unauthorized, and not sufficient to support a decree against them.—*Ib.* 241.
14. *Appearance by attorney.*—An infant can not appoint an attorney ; hence, when an infant defendant to a bill has not been properly brought in as a party, pleadings signed by an attorney, though purporting to act as "solicitor for all the defendants," do not bring the infant into court, nor amount to an appearance by him.—*Ib.* 241.
15. *Appearance; when not shown by recitals.*—When a decree *pro confesso* has been entered against two defendants, on personal service as to one, and on publication against the other as a non-resident, and is afterwards set aside, "parties consenting," this is not sufficient to show an appearance by the non-resident defendant, and thus cure the defects in the decree *pro confesso* against him.—*Holly v. Bass' Adm'r*, 387.
16. *Publication against non-resident.*—A recital in a decree *pro confesso*, against a non-resident defendant, that a copy of the order of publication "has been sent to the post-office of said defendant," does not show a compliance with the rule of practice (No. 25), which requires that a copy shall be "sent to the defendant," at his post-office when known.—*Ib.* 387.
17. *Same.*—When the affidavit of the defendant's non-residence states that his post-office is "Goodwin, Holmes county, Mississippi," and a copy of the order of publication is forwarded by mail to him at Goodman in said county, this is not sufficient to support a decree against him.—*Paulling v. Creagh*, 398.

CHANCERY—Continued.

18. *Decree against non-resident defendant.*—To support a decree against a non-resident defendant, on publication only, the statutes and rules of practice must be strictly observed, and the facts showing a compliance with them must appear by the record; a recital that publication was made in *due form*, or in *proper form*, is not sufficient.—*Ib.* 398.
19. *Same; refunding bond.*—Under the statute which was of force prior to the adoption of the Code (Clay's Digest, 353, § 45), the complainant in a chancery cause was required, before obtaining a decree against a non-resident defendant who was brought in by publication only, to give bond conditioned for the restitution of the property to abide the order of the court; and the failure to require such bond was an error, for which the decree would be reversed.—*Holly v. Bass' Adm'r*, 387.
20. *Same.*—Under the present statute (Code, §§ 3830-35), although it is provided that a decree against a non-resident defendant, who has not appeared, "is not absolute for eighteen months from the rendition thereof," unless that period is shortened by personal service of a copy of the decree, and that the plaintiff must give a restitution bond "before the execution of such decree," and that the court must direct a copy of the decree to be sent to such defendant; and although the court, in entering the decree, should require these things to be done, and the failure to comply with them would be good cause for refusing to confirm a sale under the decree, or for setting it aside; yet the decree is not reversible on error for want of any or all of them.—*Ib.* 387.
21. *Same.*—A decree against a non-resident defendant, founded on a decree *pro confesso* rendered on publication only, without any appearance, will not be reversed on error, because it fails to require the defendant, before executing it, to give the statutory bond (Code, § 3834); nor because the chancellor did not direct a copy of the decree to be sent to the defendant.—*Hurt v. Blount*, 327.
22. *Same; petition to set aside.*—When a decree in chancery against a non-resident defendant, rendered on publication only, without personal service or appearance, is set aside on his petition, and he is let in to defend, the petition has accomplished its purpose, and the cause stands as if such decree had never been rendered; consequently, it is not a material question afterwards, whether he had notice of the pendency of the suit or not.—*Hinton v. Citizens' Mutual Insurance Co.*, 488.
23. *Setting aside decree, and reinstating it.*—When a final decree is set aside in vacation, on the petition of the non-resident defendant, and at the next term this order is set aside, and the petition dismissed, the original decree is thereby restored.—*Hurt v. Blount*, 327.
24. *Description of mortgaged lands in bill.*—In a bill for the foreclosure of a mortgage, the premises should be described with the same reasonable certainty as in a complaint in a real action at law. "About one thousand and fifty acres, bounded as follows," specifying the boundaries on three sides only, and stating no fact from which the boundary on the fourth side can be ascertained, is not a sufficiently accurate and definite description.—*Hurt v. Freeman*, 335.
25. *Same.*—In such a bill, reasonable certainty in the description of the premises is all that is required. "One thousand and twenty acres of land, more or less," the greater part described by the numbers of the United States survey, with the additional words, "all lying west of the stage road between Seale's Station and Glennville, and bounded on the north by Mrs. L.'s lands, on the south by P.'s place, and on the west by I. & L., and all lying in said county," is sufficiently accurate and definite.—*Hurt v. Blount*, 327.
26. *Bill in double aspect, or in alternative.*—A bill in equity may be filed in a double aspect, or in the alternative; but, when so filed, the complainant must, in each aspect, be entitled to the same relief, and the same defenses must be applicable to each.—*Gordon's Adm'r v. Ross*, 363.
27. *Same; bill of review for error apparent, and impeaching decree for fraud.*—A bill can not be maintained which seeks, in the alternative, to review a

CHANCERY—Continued.

- decree for error apparent, or to impeach and set it aside on the ground of fraud.—*Ib.* 363.
28. *Limitation to bill impeaching decree for fraud.*—A bill to impeach a decree for fraud, though not within the terms of the statute which bars a bill of review after the lapse of three years (Code, § 3843), must, by analogy, be governed by the same limitation.—*Ib.* 363.
 29. *Statute of limitations; when available on demurrer.*—When a bill in chancery shows on its face that the relief prayed for is barred by the statute of limitations, the defense is available by demurrer.—*Berry v. Lavretta*, 374.
 30. *Same; averment of infancy.*—An averment in a bill in chancery, that the complainants' mother "was an infant under the age of twenty-one years" on a specified day, which was twelve years before the filing of the bill, being construed most strongly against the pleader, is not equivalent to an averment that she was an infant at a later day; and being thus construed, the bill shows on its face that the asserted claim is barred by the statute of limitations of ten years.—*Ib.* 374.
 31. *Same; exception when judgment is arrested or reversed; dismissal of bill without prejudice.*—When the chancellor dismisses a bill generally, and his decree is so modified by this court, on appeal, as to order the dismissal without prejudice to the right of one of the complainants to sue again; a bill filed by the heirs of said complainant, within twelve months after such dismissal, is not within the statute (Code, § 3235) which allows a new action to be commenced within one year after the arrest or reversal of a judgment for the plaintiff, although the period prescribed as a bar has been completed since the commencement of the first action.—*Ib.* 374.
 32. *Notice of amendment of bill.*—When a decree *pro confesso* has been regularly entered against a non-resident defendant on publication, this does not dispense with the necessity of giving him notice of an amendment of the bill, as required by the rule of practice (No. 47); that is, by entering notice of the amendment on the order-book.—*Holly v. Bass*, 387.
 33. *Amendment of bill, or answer; when refused in vacation.*—The allowance of an amendment to the bill or answer, to meet any state of the evidence which will sustain the claim or defense set up, is matter of right in the party asking it, and not matter of discretion with the court (Code, § 3790); but, when the application to amend is made in vacation, without notice to the adverse party, it may be refused for that reason.—*Hinton v. Citizens' Mutual Insurance Co.*, 488.
 34. *Remandment, on reversal, for amendment of bill.*—When the chancellor overrules a demurrer to the bill for want of equity, and, on final hearing on pleadings and proof, renders a decree for the complainant; this court, on reversing his decree, and holding the bill demurrable, will remand the cause, in order to give the complainant an opportunity to ask leave to amend in the court below, unless the defects are not capable of amendment.—*Wilburn & Co. v. McCalley*, 437.
 35. *Supplemental and amended bills; facts occurring after filing of bill.*—Supplemental matter, supporting the complainant's right to relief prayed by the original bill, may be introduced by amendment, without filing a supplemental bill (48th Rule of Chancery Practice); but, if the original bill does not make out a case for relief, facts subsequently occurring, no matter how introduced, can not avail the complainant.—*P. & M. Insurance Co. v. Selma Savings Bank*, 585.
 36. *Demurrer; specification of grounds.*—A demurrer to a bill in equity must set forth specially the causes or grounds of demurrer (Code, § 3748), and the court can not consider any other ground not specifically assigned.—*Ib.* 585.
 37. *Answer, or decree pro confesso; effect as evidence against co-defendant.* Neither the answer of one defendant to a bill, nor a decree *pro confesso* against him, can have any effect as evidence against a co-defendant, who claims under a conveyance from the former executed before the filing of the bill.—*Thames & Co. v. Rembert's Adm'r*, 561.

CHANCERY—Continued.

38. *Revivor under cross-bill*.—When a mortgagor files a bill to enjoin a sale of the mortgaged property under a power contained in the mortgage, and dies pending the suit; if the mortgagee wishes to obtain a decree of foreclosure, under a cross-bill and bill of revivor, as by statute he may do (Code, § 3805), he must take the necessary steps to bring in the personal representative and heirs (or devisees) of the deceased mortgagor, as defendants; and an appearance by the personal representative in the original suit, and the revivor of that suit in his name, are not sufficient to support a decree against him in the cross-suit, without any service of process upon him, or appearance by him in that suit.—*Paulling v. Creagh's Adm'r*, 398.
39. *Confirmation of report of sale*.—Under the first rule of chancery practice, which was adopted in 1854, and which declares that the Chancery Court "shall be deemed always open," among other purposes, "for carrying into execution the decrees and orders of such courts and chancellors," the chancellor has power in vacation to confirm the register's report of a sale made under a decree foreclosing a mortgage, although such report is required to be read "in open court," and must lie over one day before confirmation.—*Ex parte Branch & Co.*, 383.

CHARGE OF COURT TO JURY.

1. *Charge tending to confuse or mislead*.—Where two witnesses testify as to the contents of a writing, which is not produced, and their testimony is conflicting, the court may properly refuse a charge which, in effect, would probably produce on the minds of the jury the impression that they should give greater weight to one than to the other.—*Bynum v. So. Pipe and Pump Co.*, 462.
2. *Charge requiring explanation*.—A charge which, though it asserts a correct legal proposition, requires explanation, when applied to the facts of the particular case, to prevent it from misleading the jury, is properly refused.—*Farrish v. The State*, 164; *Duvall & Pelham v. The State*, 12.
3. *General charge on evidence, and invading province of jury*.—When the evidence, though partly oral, is without conflict, and establishes the plaintiff's right to recover, the court may instruct the jury, "if they believe the evidence, they must find the issue in favor of the plaintiff." But it is error to add to such charge these words: "The form of your verdict, under this charge, will be, *We, the jury, find the issue in favor of the plaintiff.*" Although the general charge does not invade the province of the jury, these words take from them the right to determine the credibility of the oral testimony.—*Davidson v. The State*, 432.
4. *Charge as to amount of fine to be assessed by jury*.—In a prosecution for carrying concealed weapons, the court may properly instruct the jury, that, if they find the defendant guilty, they should assess such fine, within the limits fixed by law, as they may deem necessary to suppress the evil practice of carrying concealed weapons.—*Shorter v. The State*, 130.
5. *Charge on facts conceded*.—The court may charge without hypothesis on facts which are conceded; such a charge is not an invasion of the province of the jury.—*S. & N. Railroad Co. v. McLendon*, 266.
6. *General exception to charge*.—A general exception to an entire charge, consisting of several distinct propositions, may be overruled entirely; the objectionable clause or portion should be specified and clearly pointed out, so that the attention of the court and the opposing counsel may be drawn to the supposed error.—*Ib.* 266; *Gray v. The State*, 66; *Mayor, &c., of Birmingham v. Rumsey & Co.*, 352.
7. *Charge invading province of jury*.—In a prosecution for the unlawful or wanton killing of certain animals named (Code, §§ 4409-10), if the defendant justifies the killing under a verbal license or authority from the owner, and the language relied on as conferring such license is doubtful and ambiguous, it should be left to the jury to determine its meaning; and a charge asked, assuming that the language used conferred such authority, is properly refused.—*Ashworth v. The State*, 120.

CODE OF ALABAMA (1876).

1. *Statutes in Code, not originally conforming to constitutional rules as to revising and amending laws.*—The Code of 1876, purporting to embrace all public statutes, of a general and permanent nature, of force at the time of its adoption, was enacted in conformity to the provisions of the constitution; and any statute therein included, though not originally conforming to the rules prescribed by the constitution as to revising and amending laws, became valid from the day the Code went into operation.—*Bales v. The State*, 30.
2. § 179. Official bonds.—*Brewer v. King's Sureties*, 511.
3. § 652-3. Special terms of Circuit Court.—*Bales v. The State*, 30.
4. § 868. Plat and survey by county surveyor.—*Clements v. Pearce*, 284.
5. § 1649. Duties of overseers of public roads.—*McCullough v. The State*, 75.
6. § 2098. Bills and notes payable to fictitious person or bearer.—*Blackman v. Lehman, Durr & Co.*, 547.
7. § 2124. Fraudulent conveyances.—*Thames & Co. v. Rembert's Adm'r*, 561.
8. § 2145. Execution and attestation of deed.—*Clements v. Pearce*, 284.
9. § 2432. Administrator's note binding estate.—*Wilburn & Co. v. McCalley*, 436.
11. § 2705. Statutory separate estate of married woman; what is.—*Bercy v. Lavretta*, 374.
12. § 2711. Liability of such estate, and how enforced.—*Nelms v. Armstrong & Co.*, 330; *Gilbert v. Dupree's Adm'r*, 331; *Wilburn & Co. v. McCalley*, 436.
13. § 2847. Waiver of exemptions.—*Neely v. Henry*, 261.
14. § 2890. Who is proper party plaintiff.—*Agnew v. Leath*, 345.
15. § 2904-05. Action against partnership.—*Haralson v. Campbell*, 278.
16. § 2908. Abatement and revivor of action.—*Evans v. Welch*, 250.
17. § 3058. Competency of witnesses.—*Kumpe and Wife v. Coons*, 448.
18. § 3069, 3078. Depositions taken *de bene esse*.—*Henry & Co. v. Northern Bank of Alabama*, 527; *M. & C. R. R. Co. v. Maples*, 601.
19. § 3108. Bill of exceptions.—*Ex parte Mayfield*, 203.
20. § 3113. Signing bill of exceptions in vacation.—*Ib.* 203.
21. § 3235. Statute of limitations; bringing new action after reversal.—*Bercy v. Lavretta*, 374.
22. § 3256. Damages on attachment bond.—*Copeland & Brantley v. Cunningham*, 394.
23. § 3289. Replevin bond.—*Cordaman v. Malone*, 556; *Agnew v. Leath*, 345.
24. §§ 3440-61. Builders' lien.—*Welch v. Porter & Co.*, 225; *Geiger & Co. v. Hussey*, 338.
25. § 3760. Where bill in chancery must be filed.—*Campbell v. Crawford*, 392.
26. § 3784. Demurrer.—*P. & M. Insurance Co. v. Selma Savings Bank*, 585.
27. § 3790. Amendment of bill or answer.—*Hinton v. Citizens' Mutual Insurance Co.*, 488.
28. §§ 3830-35. Decree against non-resident defendant.—*Holly v. Bass' Adm'r*, 387; *Hinton v. Citizens' Mutual Ins. Co.*, 488; *Pauling v. Creagh's Adm'r's*, 398.
29. § 3843. Limitation to bill in equity impeaching decree for fraud.—*Gordon's Adm'r v. Ross and Wife*, 364.
30. § 3886. Bill in equity by creditor without lien.—*Evans v. Welch*, 250.
31. § 3928. Special *supersedeas* bond.—*Steele v. Tutwiler*, 368; *Drake v. Webb*, 596.
32. § 3943. Judgment rendered on reversal.—*Hunt v. The State*, 196.
33. § 3946. Amendment of clerical misprisions on error.—*Smith v. Kennedy*, 334.
34. § 4107. Defamation of female.—*Haley v. The State*, 83, 89.
35. § 4109. Carrying concealed weapons.—*Hardin v. The State*, 38; *Coker v. The State*, 95; *Preston v. The State*, 127; *Shorter v. The State*, 129.
36. § 4200. Profane or obscene language, &c., at public assembly.—*Smith v. The State*, 55.

CODE OF ALABAMA—Continued.

37. § 4203. Abusive or insulting language in presence of female.—*Yancy v. The State*, 141; *Henderson v. The State*, 193.
38. § 4204. Selling liquor to be drunk on premises.—*Powell v. The State*, 177.
39. § 4205. Selling liquor to person of known intemperate habits.—*Tatum v. The State*, 147.
40. § 4210. Betting at licensed table.—*Bone v. The State*, 185.
41. § 4252. Neglect of duty by road overseer.—*McCullough v. The State*, 75.
42. § 4343. Burglary.—*Walker v. The State*, 49; *Stone v. The State*, 115; *Lowder v. The State*, 143; *Washington v. The State*, 189.
43. § 4344. Breaking into railroad car.—*Graves v. The State*, 134.
44. §§ 4346-47. Arson.—*Lockett v. The State*, 5; *Grimes v. The State*, 166.
45. § 4353. Removing or selling mortgaged property.—*Atwell v. The State*, 61.
46. § 4358. Larceny of growing crop.—*Smitherman v. The State*, 24.
47. § 4370. Obtaining money, &c., by false pretenses.—*Mack v. The State*, 138.
48. §§ 4409-11. Wanton injury or killing of animals.—*Bass v. The State*, 108; *Ashworth v. The State*, 120.
49. § 4419. Trespass after warning.—*Walson v. The State*, 19.
50. § 4450. Sentence to hard labor or imprisonment.—*Washington v. The State*, 189.
51. §§ 4647-52. Criminal proceedings before justice of the peace.—*Brown v. The State*, 97.
52. § 4656. Pursuit and arrest under warrant.—*Coleman v. The State*, 93.
53. §§ 4659, 4684. Sheriff's authority to admit to bail.—*Jones v. The State*, 161; *Evans v. The State*, 195.
54. § 4701. Appeals from justice of the peace.—*Dean v. The State*, 153.
55. §§ 4732-54. Organization of grand jury.—*Cross v. The State*, 40; *Bales v. The State*, 30; *Scott v. The State*, 59; *Berry v. The State*, 126; *Preston v. The State*, 127; *Yancy v. The State*, 141; *Weston v. The State*, 156; *Couch v. The State*, 163; *Peck v. The State*, 201.
56. §§ 4785-4824. Forms of indictments.—*Lockett v. The State*, 5; *Walson v. The State*, 19; *Smitherman v. The State*, 24; *Jones v. The State*, 27; *Smith v. The State*, 55; *Atwell v. The State*, 61; *McCullough v. The State*, 75; *Haley v. The State*, 83, 89; *Bass v. The State*, 108; *Stone v. The State*, 115; *Ashworth v. The State*, 120; *Graves v. The State*, 134; *Yancy v. The State*, 142; *Tatum v. The State*, 147.
57. § 4810. Indictment against overseer of public road.—*McCullough v. The State*, 75.
58. § 4814. Indictment for disturbing females at public assembly.—*Smith v. The State*, 55.
59. § 4819. Quashing an indictment, that another may be preferred.—*Weston v. The State*, 155.
60. § 4820. Suspension of statute of limitations.—*Weston v. The State*, 155.
61. §§ 4842-4. Right to bail.—*Ex parte Acree*, 234.
62. § 4866. *Scire facias* against bail.—*Hunt v. The State*, 196; *Peck v. The State*, 201.
63. § 4872. Service of copy of indictment.—*Nutt v. The State*, 180.
64. §§ 4882-84. Challenge of jurors.—*Bales v. The State*, 30.
65. §§ 4889-90. Objections to indictment by plea.—*Cross v. The State*, 40.
66. § 4895. Conviction on testimony of accomplice.—*Lockett v. The State*, 5.
67. § 4910. Polling jury.—*Brown v. The State*, 97.

COMMON CARRIER.

1. *Liability for loss of goods beyond his route.*—As to the liability of a common carrier who receives goods consigned to a point beyond the terminus of his own line or route, and does not by express agreement limit his liability to losses or injuries over his own line, there is a conflict of judicial decisions; but this court adopts the rule laid down in the leading English case, *Muschamp v. L. & P. Railway Co.* (8 Mees. & W. 421) and holds the carrier liable for the non-delivery of the goods at the designated place.—*M. & G. Railroad Co. v. Copeland*, 219.

CONCEALED WEAPONS. See CRIMINAL LAW, 29-35.

CONFLICT OF LAWS. See EXEMPTIONS.

CONSTITUTIONAL LAW.

1. *Rights of property.*—The principle is almost universal in its application, that no man's property can be taken from him without his consent, express or implied, except by due course of law.—*Blackman v. Lehman, Durr & Co.*, 547.
2. *Same.*—The constitutional provision which declares that no person can "be deprived of his property but by due course of law" (Art. 1, § 7), secures to every person the right to have notice of any judicial proceeding by which his rights of property may be affected, and an opportunity to be heard, and to contest every material fact involved in the proceeding; and any law authorizing a judicial proceeding, by which his rights of property might be divested or affected, without giving him such notice and opportunity, would be unconstitutional.—*Wilburn & Co. v. McCalley*, 436.
3. *Construction of statutes, when assailed for unconstitutionality.*—In the construction of a statute, when assailed on constitutional grounds, it is the duty of the courts to adopt, if possible, such a construction as will bring it within the range of the constitutional powers of the legislature, and not to impute to a co-ordinate department of the government a violation of the fundamental law of the land.—*Ib.* 436.
4. *Statutes in Code, not originally conforming to constitutional rules as to revising and amending laws.*—The Code of 1876, purporting to embrace all public statutes, of a general and permanent nature, of force at the time of its adoption, was enacted in conformity to the provisions of the constitution; and any statute therein included, though not originally conforming to the rules prescribed by the constitution as to revising and amending laws, became valid from the day the Code went into operation.—*Bales v. The State*, 30.
5. *Jeopardy.*—A defendant, in a criminal case, is never in jeopardy, when the indictment against him is so invalid that a judgment upon it would be annulled on appeal, no matter what may be the stage of the prosecution when, for that reason, it is quashed.—*Weston v. The State*, 155.
6. *Municipal ordinance, as to title and rights of purchaser at tax-sale.*—An ordinance of a municipal corporation, which makes it the duty of the tax-collector to put the purchaser in possession of lands sold for taxes, and authorizes the mayor, "if necessary," to direct the police to put him in possession; and which also declares that the certificate given to the purchaser "shall be evidence of a right to possess the premises therein specified, and to retain them until redeemed as provided by the charter, and, if the property is not redeemed within the time prescribed by the charter, shall operate as a deed of conveyance,"—is violative of the constitutional provision, contained in the 7th section of the 1st article, which declares that no person shall be deprived of his property "but by due process of law."—*Calhoun v. Fletcher*, 574.

See, also, EXEMPTIONS.

CONTESTED ELECTIONS.

1. *Conclusiveness of judgment.*—The judgment rendered on the trial of a contested election, before a court or magistrate clothed with statutory jurisdiction of such proceeding, is conclusive in a subsequent action of *quo warranto*, as to the right to the office, in favor of the party to whom it is awarded.—*Davidson v. Woodruff*, 432.
2. *Contested municipal election under charter of Selma; filing papers.*—Under the charter of the city of Selma (Sess. Acts 1874-5, p. 362, § 16), jurisdiction to try a contested municipal election is conferred, not on the Circuit Court, but on the judge thereof as a magistrate; and there is no express requisition that the application and notice of contest shall be filed with the clerk, or in his office.—*Ib.* 432.

CONTESTED ELECTIONS—*Continued.*

3. *Same; waiver of irregularities.*—When the parties to a contested election appear before the court or officer who is clothed by statute with jurisdiction to hear and determine the contest, and, without objecting to the sufficiency or regularity of the preliminary proceedings by which the contest was initiated, engage in a trial on pleadings and proof, defects in such preliminary proceedings are waived, and can not be set up in a subsequent action founded on the judgment.—*Ib.* 432.

CONTRACT.

1. *Written contract; implied stipulations.*—When parties enter into written contracts, the express stipulations and conditions therein contained can not be extended by implication: the writing is presumed to express all the stipulations, and none can be implied.—*Blackman v. Dowling*, 304.
2. *Conditional note.*—Where a promissory note, given in consideration of the payee's interest in a contract with the United States for carrying the mail on a specified route, contains the express conditions, "that said route is not abolished, nor the pay by the United States diminished;" the failure of the principal contractor, under whom the payee of the note derived his interest in the contract, to pay over to the maker his proportion of the compensation received from the United States, is no defense to an action on the note.—*Ib.* 304.
3. *Parol evidence of terms outside of written contract; subsequent modification of contract.*—Where the purchaser of a mule, having executed and delivered his note for the price, and having received the mule, "immediately after the execution of his note, and as he was about to leave with the mule, verbally agreed" with the seller that the latter "should have a mortgage on the mule to secure payment of the note;" held, that this agreement, being outside of the contract shown by the note, might be proved by parol, and was also valid as a subsequent modification of that contract.—*Glover v. McGilvray*, 508.

See, also, BILLS OF EXCHANGE, AND PROMISSORY NOTES; BONDS; VENDOR AND PURCHASER.

CORPORATIONS.

1. *Transfer of stock in private corporation, and lien of corporation on stock.*—The by-laws of an incorporated savings-bank, passed in the exercise of its corporate powers, requiring transfers of stock to be entered on its books in the presence of its president or secretary, and declaring a lien in favor of the bank on the stock of any shareholder who is indebted to it, not only on account of his unpaid stock, but also for all other debts and liabilities whatever, are intended for the protection and security of the bank, and of third persons who may in good faith acquire stock without notice of prior equitable transfers; but, while the legal title to stock can only be acquired by a transfer made in the mode prescribed, a complete equitable title may be otherwise acquired, entitling the transferee to demand that he be invested with the legal title.—*P. & M. Insurance Co. v. Selma Savings Bank*, 585.
2. *Same; stock held by partnership.*—On the dissolution of a partnership owning stock in such savings-bank, the retiring partner selling out his interest to the others, and the latter assuming all the debts of the partnership, and continuing the business under a new name; the new firm, as the successor of the old, becomes the equitable owner of the stock; and the bank's lien on the stock covers the liabilities of the new firm, in its subsequent transactions with the bank, and must prevail over the claim of an equitable assignee of the retiring partner.—*Ib.* 585.
3. *Same; estoppel in pais.*—No estoppel can arise against the bank, in such case, from a letter written by its cashier to the old firm, or to the retiring partner, stating that there was no lien or incumbrance on the stock in favor of the bank; the letter containing no intentional mis-

CORPORATIONS—*Continued.*

- representation, and being written more than twelve months before any interest in the stock was acquired by the equitable assignee.—*Ib.* 585.
4. *Municipal corporation; power to purchase fire-engine.*—The power to purchase a fire-engine, or other appliances for extinguishing fires, reasonably commensurate with the wants of the city, to be judged by the corporate authorities, is a necessary police function, and is inherent in every city government, as one of its incidental powers, unless expressly taken away.—*Mayor &c. of Birmingham v. Rumsey & Co.*, 352.
 5. *Same; execution on judgment against.*—When judgment is rendered against a municipal corporation, execution may be ordered to issue against it, as against a private person; and under such execution, though property used for public purposes cannot be seized, such as hospitals, markets, cemeteries, &c., private property belonging to the corporation, and not useful or used for corporate purposes, may be seized and sold.—*Ib.* 352.
 6. *Garnishment of debt due for taxes.*—On grounds of public policy, a judgment creditor of a municipal corporation can not, by process of garnishment, reach and subject funds accruing to it by taxation, either while in the course of collection by suit, or after they have been paid into its treasury. (Overruling *Smoot v. Hart*, 33 Ala. 69.)—*Underhill v. Calhoun*, 216.
 7. *Municipal corporation; jurisdiction of mayor.*—When a person is brought before the mayor of a municipal corporation, charged with a violation of a by-law or ordinance of the corporation, the existence of a by-law or ordinance, established and promulgated by the proper authority prior to the commencement of the prosecution, is an essential element of his jurisdiction; but the reasonableness of the by-law or ordinance, while affecting its validity, is a question for his decision, and not a question affecting his jurisdiction in the particular case.—*Woodruff v. Stewart*, 205.
 8. *Same; approval of ordinance by mayor.*—When the charter of a municipal corporation requires, that every ordinance passed by the board of aldermen shall be signed by the mayor, if approved by him, or, if disapproved, shall be passed over his veto by a two-thirds vote of a full board, it is not essential to the validity of an ordinance that it shall be signed by the mayor, when it is copied at length in the minutes of the board, which are signed by him, and which show that he voted for it on its passage by the board.—*Ib.* 206.
 9. *Revised Code of city of Selma.*—Tested by the principle above declared, the "Revised Code of the city of Selma," adopted by an ordinance on the 31st December, 1870, was legally adopted.—*Ib.* 206.
 10. *Bonds of corporation; negotiability of.*—The bonds of a corporation, public or private, if issued by authority, and possessing in themselves the requisites of negotiable paper, are, after some vacillation of judicial decision, now recognized as on an equality with bank-notes, bills of exchange, and promissory notes; and the corporate seal does not affect their negotiability, neither conferring nor destroying that quality. *Blackman v. Lehman, Durr & Co.*, 547.
 11. *Municipal bonds of Troy, issued in aid of Mobile and Girard Railroad.* The bonds issued by the city of Troy in aid of the Mobile and Girard Railroad, under the authority of the special statute approved December 8th, 1868 (Sess. Acts 1868, pp. 395-6), are not negotiable paper, because on their face they are made payable on a contingency which might never happen—that is, the completion of the railroad to Troy; and also because they are payable to bearer only. Not being negotiable, the title to such bonds can not pass by delivery, nor, as against the real owner, otherwise than by his indorsement or assignment.—*Ib.* 547.
 12. *Judicial notice of charter of municipal corporation.*—The charter of a municipal corporation, and special statutes conferring on it additional powers for special purposes, are public statutes, of which the courts will take judicial notice; and all persons dealing with the corporation must,

CORPORATIONS—*Continued.*

- at their peril, take notice of the capacity to contract, its limitations and restrictions, thereby conferred on the corporation.—*Mayor &c. of Wetumpka v. Wetumpka Wharf Co.*, 611.
13. *Municipal corporation; power to borrow money, to issue negotiable paper, and to aid private corporations.*—In the absence of an express grant of power, a municipal corporation can neither borrow money, nor issue negotiable paper, nor become a party to such paper, nor become a stockholder in a private corporation, nor incur debts in aid of such private corporation; but, under the constitution of 1819, there was no inhibition against the grant by the General Assembly of express power to such corporation to incur debts, or to borrow money, or to issue negotiable securities, to be paid by municipal taxation, in aid of works of internal improvements.—*Ib.* 611.
 14. *City of Wetumpka; powers of corporation under original charter.*—The original charter, or act incorporating the city of Wetumpka (Sess. Acts 1838-9, pp. 44-51), conferred upon that corporation only the governmental powers usually conferred upon municipal corporations at that time for the purposes of local government; and these did not include any powers for the encouragement of private gain, trading, speculation, or pecuniary profit, except as those objects might be indirectly promoted by a prudent exercise of the powers of local government.—*Ib.* 611.
 15. *Same; under special acts of 1848 and 1850, in aid of works of internal improvements.*—The act approved February 29, 1848 (Sess. Acts 1847-8, pp. 223-5), authorized the corporate authorities of the city of Wetumpka to issue its bonds, not exceeding \$50,000 at any one time, and to appropriate the money arising from their sale to securing the right of way, and constructing a canal, around the lower end of the shoals of the Coosa river; and the amendatory act approved February 1st, 1850 (Sess. Acts 1849-50, p. 348), extended the amount to \$100,000, and authorized the money to be appropriated, under the supervision of the mayor and aldermen, "for any purpose of internal improvement for the benefit of the citizens of Wetumpka." In the case of *Mayor and Aldermen of Wetumpka v. Winter* (29 Ala. 651), this court decided that the said act of 1850 authorized the city to subscribe for stock in the Tallahassee Branch of the Central Plank-Road Company; and the court now adheres to that decision, so far as it affects the questions involved in the present case.—*Ib.* 611.
 16. *Same; limitations and restrictions on this power.*—The said act of 1848, by its 1st section, expressly declared: "No bond shall be issued, but upon an entire concurrence of the board of mayor and aldermen, upon a full attendance of all the members of the board, and when there is no vacancy; which shall be made manifest only by an entry of the order for issuing being made on the minutes of the board, and signed by each member thereof; nor shall any contract amounting to one hundred dollars, made under any of the provisions of this act, be valid, which is not made under all the restrictions in this section recited." These limitations and restrictions were not relaxed, nor in any manner modified, by the subsequent act of 1850; and they are applicable to all bonds issued under that act.—*Ib.* 611.
 17. *Same; when purchaser is chargeable with notice of such restrictions.*—A purchaser of a bond issued under the said act of 1850, and reciting on its face that it was so issued, is chargeable with notice of these restrictions and conditions, and can not claim protection as an innocent holder, although the bond also recites that it was issued in conformity with the statute.—*Ib.* 611.

COUNTY SURVEYOR.

1. *Plat and survey by.*—A survey of lands, made by a county surveyor without notice to the party in adverse interest, is not legal evidence against him (Code, § 868); but it would be admissible evidence in connection with the testimony of the surveyor himself as to its correctness.—*Clements v. Pearce*, 284.

COURT, CIRCUIT.

1. *Special terms; validity of indictment and trial at.*—Under the statute (Code, §§ 652-3), a circuit judge has power to convene a special term of the court, in any county in his circuit, whenever, in his opinion, a special term is necessary; the jurisdiction and authority of the court at a special term, convened in pursuance of the statute, are as plenary as at a regular term; an indictment, found by a grand jury organized at such special term, is valid, and a trial and conviction under it are neither illegal nor irregular.—*Bales v. The State*, 30.

COURT, COUNTY.

1. *Madison County Court; when appeal lies.*—Under the act "to regulate the trial of misdemeanors in Madison county," approved February 19th, 1877, an appeal lies directly to this court, from the judgments of said County Court, in criminal cases commenced in that court, as well as in cases transferred to it from the Circuit Court under the provisions of that act.—*Cawthorn v. The State*, 157.
2. *Judgment on facts; when not reversed.*—On appeal from the judgment of the County Court, in a cause which was tried before the judge without a jury, if the record shows that the judgment is founded upon conflicting oral testimony, this court will not disturb it, unless it is manifestly wrong.—*Ib.* 157.

CRIMINAL LAW.

APPEAL AND CERTIORARI.

1. *Madison County Court; when appeal lies.*—Under the act "to regulate the trial of misdemeanors in Madison county," approved February 9th, 1877, an appeal lies directly to this court, from the judgments of said County Court, in criminal cases commenced in that court, as well as in cases transferred to it from the Circuit Court under the provisions of that act.—*Cawthorn v. The State*, 157.
2. *Certiorari.*—There is no statute which gives a *certiorari* in a criminal case, to remove a judgment rendered by a justice of the peace; and the common law did not give that remedy.—*Dean v. The State*, 153.
3. *Appeal from justice of the peace; when barred.*—In a criminal case tried before a justice of the peace, in a matter within his jurisdiction, the defendant has a right of appeal, under the rules and regulations prescribed for the trial of appeals from the County Court (Code, § 4701); and no time being prescribed within which the appeal must be taken, the right is only lost by the lapse of time which would bar an appeal to this court.—*Ib.* 153.

ARREST.

4. *Pursuit and arrest under warrant, in another county.*—The statute which provides that an officer, having a warrant of arrest to execute, "may pursue the defendant in another county," and, on obtaining an indorsement of the warrant as prescribed, "may summon persons to assist him in making the arrest and exercise the same authority as in his own county" (Code § 4656), does not mean that the execution must be begun in the latter county, when the defendant is there, and be followed up in the event of his fleeing into another county.—*Coleman v. The State*, 93.

ARSON.

5. *Burning jail.*—If a prisoner, confined in the county jail, set fire to the building, with the intent only to burn a hole through which he may escape, not intending that the building should be further damaged, he is guilty of arson.—*Lockett v. The State*, 5.
6. *Admissibility of indictments as evidence.*—The indictments pending against

CRIMINAL LAW—*Continued.*

the prisoners at the time of their attempt to escape by burning the jail, are admissible evidence against one of them on his trial under indictment for the arson.—*Ib.* 5.

7. *Sufficiency of indictment in description of building burned.*—In an indictment for arson (Code, §4347), the building burned may properly be described as "the jail of Talladega county, which said jail or building was erected for public use," without further description or averment of ownership.—*Ib.* 5.
8. *Burning store or dwelling-house.*—Setting fire to a store-house, with the intent that the fire should be communicated to, and should burn, a dwelling-house situated near by, is, in law, deemed the burning of the latter.—*Grimes v. The State*, 166.

ASSAULT ; ASSAULT WITH INTENT TO MURDER.

9. *Charge defining assault.*—A charge to the jury, in these words, "An assault is an attempt to strike, in striking distance, or to shoot in shooting distance," construed with reference to the evidence in this case, is not erroneous.—*Gray v. The State*, 66.
10. *Evidence of malice or intent.*—Under a prosecution for an assault with intent to murder, any evidence is admissible which tends to show malice, ill-will, or other motive for the act of the accused ; and for this purpose, the fact of a former altercation or difficulty between the parties, but not the merits or details thereof, may be given in evidence.—*Ib.* 66.
11. *Intent, as ingredient of offense ; charge as to.*—The intent, or state of mind, with which the defendant made the assault upon the prosecutor, or person injured, is a question for the determination of the jury, in view of all the evidence ; and a charge to the jury which predicates it of a given state of facts, as matter of law, is properly refused.—*Washington v. The State*, 135.

BAIL.

12. *Right to bail in capital case.*—A prisoner, charged with a capital felony, being entitled to bail as a matter of right, before conviction, except "when the proof is evident, or the presumption great," should not be refused bail, when the evidence against him is entirely circumstantial, unless it excludes to a moral certainty every reasonable hypothesis but that of his guilt.—*Ex parte Acree*, 234.
13. *Sheriff's authority to admit to bail.*—When a person is committed to jail by a magistrate on a preliminary examination, charged with a bailable felony, the sheriff has no authority to admit him to bail, unless the magistrate indorsed on the commitment the amount of bail required (Code, § 4684) ; and a recognizance taken by him, without such indorsement, is void.—*Evans v. The State*, 195.
14. *Same.*—On executing a warrant of arrest, issued by a justice of the peace, for a misdemeanor which he has not jurisdiction to try, the sheriff may take bail for the appearance of the defendant at the next term of the court having jurisdiction of the offense, or at the term then being held when the court is in session (Code, § 4659) ; but a recognizance taken by him, conditioned for the appearance of the defendant before the justice, on a day specified in the warrant, is without statutory authority, and void.—*Jones v. The State*, 161.
15. *Sci. fa. against bail ; nature of proceeding.*—A proceeding by *scire facias*, to fix the liability of bail on a forfeited recognizance, is a civil action.—*Peck v. The State*, 201 ; *Hunt v. The State*, 196.
16. *Same ; discontinuance.*—The proceeding is not discontinued by the unexplained failure of the court to take action on it for one or more terms.—*Hunt v. The State*, 196.
17. *What defenses are available.*—If the recognizance was taken by an officer authorized by law to take and approve it, the sureties can not, in defense of a proceeding to fix their liability for the default of their prin-

CRIMINAL LAW—*Continued.*

- cipal, raise any objection to the manner of the arrest, nor to the sufficiency of the indictment.—*Peck v. The State*, 201.
18. *Judgment final against bail; what record must show.*—To support a final judgment by default on a forfeited recognizance, the record must show that the *scire facias* was returned "executed," or that there were two returns of "not found," which the statute (Code, § 4866) makes equivalent to personal service.—*Hunt v. The State*, 196.
19. *Same; amendment of judgment.*—When the record shows that the *scire facias* was returned executed on all the recognizers but one, and judgment final was taken against all, without two returns as to the one not found, this court will amend the judgment by discontinuing the proceeding as to him, if the record shows no other error.—*Ib.* 196.
20. *Same; form of scire facias.*—Each of the parties to the recognizance, against whom a judgment *nisi* has been taken, should be allowed to show cause why the judgment should not be made absolute against him, and the *scire facias* should be so framed; and a judgment final against all should show that they all failed to appear, or, appearing, failed to show a sufficient excuse.—*Ib.* 196.

BURGLARY.

21. *What is sufficient breaking and entering.*—A person who, with the intent to steal shelled corn, heaped up in a crib on the floor, bores a hole through the floor, through which the loose corn runs down into his sack below, is guilty of burglary (Code, § 4343): the use of the auger in such case, with the intent to steal the corn, and effecting that purpose, constitutes both the breaking and the entry which are necessary elements of the offense.—*Walker v. The State*, 49.
22. *Same.*—A servant, employed by an attorney in and about his office, and intrusted with the key to the front door, may be convicted of burglary (Code, § 4343), if he enters the office by night, by using the key, with the intention at the time of stealing the money of his employer while asleep in an inner room; but, if he is in the habit of sleeping in the office, with the consent of his employer, or without objection from him, and enters with the intention only of going to bed, but afterwards forms the design to steal the money, and attempts to do so, he is not guilty of burglary.—*Lowder v. The State*, 143.
23. *Same.*—In this case, since "there was no evidence that the defendant had opened the door of the office at all, as there was none that it was shut before he entered," the court should have instructed the jury, on his request, that upon the evidence they must find him not guilty.—*Ib.* 143.
24. *Same.*—The two rooms of a gin-house, which had not been used as such for two years or more, being separated by a partition in which an opening was left, not for ingress or egress, but for the passage of the cotton from the gin (when running) into the lint-room; and being used and occupied by two different persons, each having the key to the door of his own room; if one of them enters the room of the other, through the said opening, with the intent to steal his seed-cotton stored therein, he is not guilty of burglary, though he opened and entered the door of his own room, with the intent to pass through the opening and steal the cotton in the other room, and carried his intent into execution.—*Stone v. The State*, 115.
25. *Sufficiency of indictment, in description of building broken and entered.*—An indictment which charges that the accused broke and entered "a gin-house, the property of W. R., in which was kept, for use, sale, or deposit, seed-cotton, a thing of value," &c., is sufficient, without an additional averment that the gin-house was specially constructed for the use to which it was applied. Under the statute (Code, § 4343), only structures of a temporary character, erected for special purposes or occasions, require such additional descriptive averment.—*Ib.* 115.
26. *Breaking into railroad car; sufficiency of indictment.*—In an indictment for burglary in breaking and entering a railroad car (Code, § 4344), it is not sufficient to aver that the goods in the car were therein kept "for

CRIMINAL LAW—*Continued.*

- transportation": the averment should be, that they were kept "for transportation as freight."—*Graves v. The State*, 134.
27. *Same; averment of ownership.*—In an indictment under this statute, the ownership of the car broken into and entered is an indispensable averment.—(STONE, J., *dissenting.*)—*Ib.* 134.
28. *Verdict and sentence on conviction.*—Under an indictment for burglary, and a verdict of guilty as charged in the indictment, not fixing the punishment (Code, §§ 4343, 4450), the court may impose a sentence to confinement in the penitentiary at hard labor for two years.—*Washington v. The State*, 189.

CARRYING CONCEALED WEAPONS.

29. *What will not excuse.*—It is no excuse for carrying a pistol concealed about the person (Code, § 4109), that the defendant was engaged to play a part in which a pistol was to be used, in a school exhibition to take place on another day.—*Preston v. The State*, 127.
30. *Exception in favor of persons "travelling."*—The privilege of carrying concealed weapons, given by the statute to a person "travelling" (Code, § 4109), commences when he sets out on a journey, and continues until he reaches home on his return.—*Coker v. The State*, 95.
31. *Threatened or apprehended attack.*—To establish the defense of a threatened attack, the threat must be real, and not simply apparent, or simulated; but, to make out an apprehended attack, it is sufficient to show facts which may convince the jury that he had good reason to apprehend an attack—as reports of threats, believed to be true, though not true in fact; hostile demonstrations; preparations for attack, real or apparent, and the entire conduct of the parties.—*Shorter v. The State*, 129.
32. *Same; relevancy of evidence as to.*—To make out the defense of a threatened or apprehended attack, within the statutory exception, the motive (or purpose) of carrying the weapon must be defense against violence, threatened or apprehended. If offense instead of defense—a meditated attack on another, and not an apprehended attack by him—be the real motive, the party is guilty of violating the statute; and as bearing on this question, the conduct and declarations of the accused and the prosecutor, during an altercation and subsequent rencontre between them, out of which the prosecution arose, are relevant and competent evidence.—*Ib.* 129.
33. *Same.*—To make out a threatened or apprehended attack, as a defense to a prosecution for carrying concealed weapons, the defendant offered in evidence a letter written by the prosecutor to the chief of police, in which the writer stated "that he did not wish to violate the law, nor to be arrested for violating the law, but that he understood the defendant had made threats against him, and was therefore carrying a pistol concealed about his person." *Held*, that the contents of the letter could not be garbled by the defendant, but must be taken, altogether as written; and that the court properly refused a charge, requested by him, to the effect "that what was said in the letter about any threats made by him could not be considered by the jury as evidence."—*Ib.* 129.
34. *Evidence showing threatened or apprehended attack.*—Under an indictment for carrying concealed weapons, the defendant having proved, to establish the defense of a threatened or apprehended attack, that he had been forcibly seized by night, a few months before the time specified by the witness for the prosecution, by a party of armed men, some of whom resided in Alabama, and others in Georgia, and carried off to a distant place, where he was set at liberty after some judicial proceeding before a magistrate; and that the persons engaged in this attack, whose names were mentioned, and who resided near him, had declared that "they intended to take him and carry him off again, and that they would as soon shoot him as to shoot a hog," which threats were communicated to him; it is permissible for him to further prove "that said parties were prowling through the country, armed, and without any employ-

CRIMINAL LAW—Continued.

ment, sometimes for a while in Georgia, dodging in and out of Alabama."—*Hardin v. The State*, 38.

35. *Charge as to amount of fine to be assessed by jury*.—In a prosecution for carrying concealed weapons, the court may properly instruct the jury, that, if they find the defendant guilty, they should assess such fine, within the limits fixed by law, as they may deem necessary to suppress the evil practice of carrying concealed weapons.—*Ib.* 130.

DEFAMATION OF FEMALE.

36. *Constituents of offense*.—To authorize a conviction for the slander of a female by words "falsely and maliciously imputing to her a want of chastity" (Code, § 4107), it is not necessary that the accused should have entertained any special personal malice towards the person defamed: if the words are false, naturally tend to the injury of the person defamed, and were spoken recklessly, though without special ill-will, a conviction may be had.—*Haley v. The State*, 83.
37. *Sufficiency of indictment*.—A form of indictment being prescribed by the statute, for defamation or slander of female (Code, § 4107; Form No. 56, p. 997), according to the repeated decisions of this court, it is sufficient to follow the prescribed form.—*Haley v. The State*, 89.
38. *Proof of words as laid*.—Since the statute does not require the precise words spoken to be set out in the indictment, but only the substance of them, it is not necessary to prove the speaking of the very words as charged: evidence of other words, substantially corresponding with the averment, is admissible, and sufficient to support a conviction.—*Ib.* 89.
39. *Meaning and explanation of words used*.—When the words used are unambiguous, and of ordinary acceptation and signification, the court and jury must construe them; but, when some cant phrase, or low expression, not having an ordinary acceptation, is used, a witness may testify as to its meaning.—*Ib.* 89.
40. *Evidence of words defamatory of other women*.—Evidence of words defamatory of other women, though uttered in the same conversation in which the alleged slanderous words against the woman named in the indictment were used, is not relevant, nor admissible against the defendant, *Ib.* 89.

DISTURBING FEMALES AT PUBLIC ASSEMBLY.

41. *Sufficiency of indictment*.—An indictment which charges, that the defendants, "by rude and indecent behavior, or by profane or obscene language, willfully disturbed females, members of the society called," &c., "at the Fair Grounds in or near the city of Montgomery, met for the purpose of instruction, amusement, or recreation," is insufficient, and fatally defective. It does not conform to the language of the statute creating the offense (Code, § 4200), for want of an averment that the females were met in "public assembly;" nor to that of the statute prescribing the form of indictment (§ 4814), for want of an averment that there was an "assemblage" of people, composed in whole or in part of the females.—*Smith v. The State*, 55.

EVIDENCE.

42. *Accomplice, examined as to matters criminalizing himself*.—When an accomplice consents to testify as a witness for the State, he can not refuse to answer a question because his answer may criminate himself; but this rule only extends to questions concerning matters about which he has already testified.—*Lockett v. The State*, 5.
43. *Same; how corroborated*.—When a conviction of felony is sought on the testimony of an accomplice, there must be corroborative evidence tending to connect the defendant with the commission of the crime (Code, § 4894); and when there is such corroborative evidence, it is for the jury to decide the effect to which it is entitled.—*Ib.* 5.

CRIMINAL LAW—*Continued.*

44. *Admission as to testimony of absent witnesses.*—On application for a continuance in a criminal case by the defendant, on account of the absence of material witnesses, the court may, in its discretion, require the State to admit the truth of the facts proposed to be proved by the absent witnesses, or simply to admit that the witnesses, if present, would testify to the facts as stated; but, whether the admission be in either form, it is equally conclusive for the purposes of the trial.—*Peterson v. The State*, 113.
45. *Same.*—If one of the absent witnesses should come into court, and be examined during the trial, a contradiction, or inconsistency, between his testimony and the admission as to what his testimony would be, is immaterial, and cannot be considered by the jury in determining the effect of the admission as to the testimony of the other absent witnesses.—*Ib.* 113.
46. *Admissibility of confessions.*—Although the more recent authorities favor the admissibility of confessions, unless they are shown to have been made under the influence of promises or threats on the part of an officer of the law; yet this court, constrained by its former decisions, holds a confession inadmissible, when induced by hope or fear excited in the mind of the accused, by the representations of any person connected with the prosecution, or with the accused himself, who, considering his relations and condition, may fairly suppose that such person has power to secure the performance of his promises or threats; and excludes the confessions of the accused in this case, made while he was in jail under a charge of burglary, to a clerk in the storehouse alleged to have been broken and entered, who was also a part owner of the goods said to have been stolen from it, and induced by his promises not to prosecute the accused, and not to appear as a witness against him unless compelled.—*Murphy v. The State*, 1.
47. *Same; when corroborated.*—When the confession of the accused is corroborated by extraneous facts—as, in this case, by the discovery of a part of the stolen goods, in consequence of a statement made by him, in the possession of a particular person recently after the burglary—it is competent to prove to the jury his statement and the corroborating fact of the discovery; but this does not render competent his confession, at the same time, that he committed the burglary and larceny, if such confession was improperly procured by promises or threats.—*Ib.* 1.
48. *Confessions; when voluntary and admissible.*—Where the deceased was killed by being cut with a knife, during a sudden quarrel and fight between him and the defendant; and a witness for the prosecution stated that, a short time after the difficulty, the defendant came up while witness was standing with one W. and another person, and being asked by W. "what he had done to Charlie" (meaning the deceased), said that he "had knocked him down with a stick;" that, on W. saying "he had done more than that," the defendant started off, but was pursued and overtaken by W., who thereupon arrested him, and left him in charge of witness and the man who was standing with him; and that while thus in their custody, no threats or promises being made by any one, the defendant said, "I have done what I never wanted to do, or intended to do: I cut Charlie's throat before he drew his knife;" held, that the confession was voluntary and admissible.—*McNeezer v. The State*, 169.
49. *Conduct and declarations of defendant; when admissible against him.*—The conduct and declarations of the defendants on the evening of the homicide, from the time they came to the house where the deceased was living with her son-in-law, until the commission of the crime, are admissible evidence against them, when parts of one continuous transaction, although occurring between the defendants and the son-in-law, in the absence of the deceased, and outside the house where she was, and not shown to have any immediate connection with the crime.—*Armor v. The State*, 173.

CRIMINAL LAW—*Continued.*

50. *Admissibility of defendant's declarations, as evidence for him.*—As a general rule, a person charged with crime can not make evidence for himself, by proof of his own declarations; and when they are admitted as evidence for him, it is as part of the *res gestæ*, or under some other recognized exception to the general rule.—*Stewart v. The State*, 199; *Atwell v. The State*, 61.
51. *Same.*—Where the defendant was arrested under a charge of larceny, and at first denied having any of the stolen money, but afterwards offered to tell the police-officer, who professed to "know all about it," where the money was, and said, that it was buried under the hearth in his house; and the officer having failed to find the money in the place indicated, the defendant went to his house with the officer, raised a brick in the hearth, and disclosed the money; and "after pointing out the money, defendant said it was given to him by" a servant in the employment of the prosecutrix; held, that this declaration was not admissible evidence for defendant, not being explanatory of possession, nor a part of the *res gestæ*.—*Cooper v. The State*, 80.
52. *Declarations not to be garbled.*—To make out a threatened or apprehended attack, as a defense to a prosecution for carrying concealed weapons (Code, § 4109), the defendant offered in evidence a letter written by the prosecutor to the chief of police, in which the writer stated "that he did not wish to violate the law, nor to be arrested for violating the law, but that he understood the defendant had made threats against him, and was therefore carrying a pistol concealed about his person." Held, that the contents of the letter could not be garbled by the defendant, but must be taken altogether as written; and that the court properly refused a charge, requested by him, to the effect "that what was said in the letter about any threats made by him could not be considered by the jury as evidence."—*Shorter v. The State*, 129.
53. *Standard medical treatises as evidence.*—The principle is settled by former decisions of this court, that standard medical books, in connection with proper explanation, when necessary, of the terms used, may be read to the jury as evidence in a criminal case.—*Bales v. The State*, 30.
54. *Proof of character; weight and effect as evidence.*—In all criminal prosecutions, whether of felony or misdemeanor, the accused may prove his good character, not only when a doubt exists on the other proof, but even to generate a doubt of his guilt; but its value varies according to the proof to which it is opposed, and in connection with which it must be weighed and estimated by the jury; and it does not shield from the consequences of a criminal act, proved to the satisfaction of the jury, though it may raise a reasonable doubt of the act having been done with a criminal intent.—*Armor v. The State*, 173.
55. *Measure of proof, and reasonable doubt.*—As to the measure of proof required in criminal cases, and the reasonable doubt which will justify an acquittal, the correct rule is laid down in the case of *Coleman v. The State*, 59 Ala. 52; and that rule applies to a prosecution for selling liquor to a person of known intemperate habits.—*Tatum v. The State*, 147.
56. *Reasonable doubt; charge requiring explanation.*—Although, in criminal cases, as a general proposition, "it is safer to acquit, in cases of doubt, than to convict;" yet a charge asked, asserting that proposition, is properly refused, because, without explanation, it is calculated to mislead the jury.—*Farrish v. The State*, 164.
57. *Circumstantial evidence.*—A person charged with a felony should not be convicted on circumstantial evidence alone, unless it excludes to a moral certainty every reasonable hypothesis but that of his guilt: no matter how strong the circumstances may be, they do not come up to the full measure of proof which the law requires, if they can be reconciled with the theory that another person was the guilty agent.—*Ex parte Acree*, 234.
58. *Preliminary questions to witness, as to age, occupation, &c.*—It is a common practice, where a witness is put on the stand, to ask him his age, residence, condition in life, etc.; which questions are merely introductory,

CRIMINAL LAW—*Continued.*

- intended to aid the jury in putting a proper estimate on his testimony, and hardly the subject of exception. Under this practice, the prosecutrix in a criminal case may be asked, "if she was a widow."—*Cooper v. The State*, 80.
59. *Depositions in criminal cases.*—The statutory provisions which authorize the taking of depositions in criminal cases (Code, §§ 4932-35), apply only to cases pending in court, and not to preliminary examinations before committing magistrates.—*Couch v. The State*, 163.
60. *Competency of child as witness.*—*Held*, in this case, that a little negro girl, about nine years old, was improperly permitted to testify as a witness, when the only evidence as to her competency was, that in answer to questions put to her by defendant's counsel, she said, "that she did not know what the Bible was ; had never been to church but once, and that was to her mother's funeral ; did not know what book it was she laid her hand on when sworn ; had heard tell of God, but did not know who it was ; and said, if she swore to a lie, she would be put in jail, but did not know she would be punished in any other way."—*Carter v. The State*, 52.
61. *Proof of venue.*—When the bill of exceptions purports to set out all the evidence adduced, and shows no proof of the venue, a judgment of conviction will be reversed.—*Cawthorn v. The State*, 157.
62. *Discredited witness ; weight of testimony of.*—There is no maxim of the law of evidence which requires greater caution in its application, than that which affirms that a witness, intentionally giving false testimony as to any material fact, is to be wholly discredited by the jury ; and this court "follows the authorities which hold that it is not a rule of law, affecting the competency, operating a disqualification of the witness, to be given in charge to the jury as imperatively binding them, but is to be applied by them, according to their sound judgment, for the ascertainment, and not for the exclusion of truth."—*Grimes v. The State*, 166.
63. *Proof of insanity.*—As to the proof of insanity, as a defense in a prosecution for murder, see *Boswell v. The State*, 307.

FALSE PRETENSES.

64. *Intent to injure or defraud ; averment and proof of.*—Under an indictment for obtaining money or chattels by false pretenses (Code, § 4370), an intent to injure or defraud must be alleged and proved ; but it is not necessary to aver the name of the person intended to be injured or defrauded, and it is sufficient to prove an intent to injure or defraud the owner, or any person having the possession and custody of the money or chattels.—*Mack v. The State*, 138.
65. *Same ; widow's interest in goods of deceased husband's estate, before administration granted.*—The widow has such an interest in the personal chattels belonging to the estate of her deceased husband, before letters of administration have been granted on the estate, that a conviction may be had under the statute against any one who, by any false pretense, obtains possession of them from a bailee, with intent to injure or defraud her.—*Ib.* 138.
66. *Relevancy of evidence showing use by defendant of goods or chattels ; presumption in favor of ruling of court.*—The use to which the chattels or goods are applied by the defendant, after obtaining them by the alleged false pretense, showing a conversion, or attempted conversion to his own use, is competent evidence against him, as tending to prove an intent to injure or defraud the owner ; and if the bill of exceptions leaves it doubtful whether this was before or after he had obtained them by the false pretense charged, this court will indulge the presumption which will support the ruling of the primary court.—*Ib.* 138.

GAMING.

67. *Betting at licensed table.*—To authorize a conviction for betting at a table

CRIMINAL LAW—Continued.

regularly licensed (Code, § 4210), it must be proved that the defendant bet money, bank-notes, or something else of value, other than the charge for the use of the table, and that the table was regularly licensed. The statement of a witness that the defendant "bet" at the table, without more, is not sufficient proof of the first fact; and if it appears that the table was under the control of a person who had not taken out a license, but had procured the transfer of a license from the former proprietor, such license not being transferrable, the prosecution fails also as to the second fact necessary to be proved.—*Bone v. The State*, 185.

HABEAS CORPUS.

68. *Appellate jurisdiction on habeas corpus.*—When application is made to this court for the writ of *habeas corpus*, after relief has been refused by an inferior court or magistrate, to whom a proper application was made, the jurisdiction of this court is revisory and appellate only; hence, it can not receive or consider evidence which was not before the primary court or judge.—*Ex parte Brown*, 187.
69. *Relief on habeas corpus.*—To authorize a discharge from custody on *habeas corpus*, when the applicant or prisoner is held under the order of a court or magistrate, a want or excess of jurisdiction, and not a mere irregularity in the exercise of jurisdiction, must be shown.—*Id.* 187.

INDICTMENT.

70. *Averment of facts as unknown.*—Under an indictment which charges the larceny of "sundry United States treasury-notes, or national-bank bills, the number and denomination of which are to the grand jury unknown, of the aggregate value of forty dollars," a conviction can not be had, if the evidence adduced on the trial shows that the number and denomination of the stolen bills were in fact known to the grand jury; but, if they were in fact unknown, though by reasonable diligence and inquiry they might have been ascertained, the averment is sufficient, and a conviction may be had.—*Duval & Pelham v. The State*, 12.
71. *Averment of defendant's Christian name.*—An indictment which describes the defendant as "Douglas Jones, alias Dug Jones, whose true Christian name is to this grand jury unknown," is inconsistent and self-repugnant, and will not support a conviction.—*Jones v. The State*, 27.
72. *Same.*—When the pleader has any doubts as to the Christian name of the defendant, it may be averred in the indictment under an *alias*.—*Haley v. The State*, 89.
73. *Statement of name of third person.*—It is not good matter for a plea in abatement, that, in stating the name of a third person in an indictment, the initial letter of his Christian name is used, instead of the name itself.—*Haley v. The State*, 83.
74. *Conclusion of.*—When the State of Alabama is named in the caption of an indictment, it is sufficient if the indictment concludes "against the peace and dignity of the State," without again naming it.—*Atwell v. The State*, 61.
75. *Averment as to ownership of property, in different counts; election.*—In an indictment for wanton injury to stock, or other similar offense, if there is any doubt as to the ownership of the property, it may be laid, in two or more counts, in different persons; and in like manner, when the identity of the owner is known, but there is a doubt as to his true name, it would not be improper, though probably unnecessary, to aver it in different forms, in separate counts. But, when the ownership is laid in two or more persons, in separate counts, and the evidence adduced on the trial discloses two or more distinct offenses, one applicable to each count, a case of election is presented, and there can be a conviction of only one offense.—*Bass v. The State*, 108.
76. *Statutory indictments.*—This court has repeatedly held, that in framing indictments on statutes which create new offenses, and describe their

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constituents, it is sufficient to follow the language of the statute, or to describe the offense in other words of equivalent import; and has uniformly sustained the sufficiency of the forms of indictment prescribed by the Code, though with doubt and hesitation in some extreme cases. But, when an indictment neither pursues the words of the statute creating the offense, nor follows the prescribed form, it must aver every material constituent of the offense (except the venue and time), or it will be held insufficient.—*Smith v. The State*, 55.

77. *Disturbing females at public assembly.*—An indictment which charges, that the defendants, “by rude and indecent behaviour, or by profane or obscene language, willfully disturbed females, members of the society called,” &c., “at the Fair Grounds in or near the city of Montgomery, met for the purpose of instruction, amusement, or recreation,” is insufficient, and fatally defective. It does not conform to the language of the statute creating the offense (Code, § 4200), for want of an averment that the females were met in “public assembly;” nor to that of the statute prescribing the form of indictment (§ 4814), for want of an averment that there was an “assemblage” of people, composed in whole or in part of the females.—*Ib.* 55.
78. *Against overseer of public road.*—An indictment against the overseer of a public road, which alleges that he “failed to discharge his duties as such overseer,” without averring any particular failure or neglect of duty by him, is made sufficient by the statute (Code, § 4810), although it would be fatally defective at common law.—*McCullough v. The State*, 75.
79. *Defamation of female.*—A form of indictment being prescribed by the statute, for defamation or slander of a female (Code, § 4107; Form No. 56, p. 997), according to repeated decisions of this court, it is sufficient to follow the prescribed form.—*Haley v. The State*, 89.
80. *Arson; description of building burned.*—In an indictment for arson (Code, § 4347), the building burned may properly be described as “the jail of Talladega county, which said jail or building was erected for public use,” without further description or averment of ownership.—*Lockett v. The State*, 5.
81. *Larceny of growing corn.*—An indictment which charges that the defendant “feloniously took and carried away one peck of corn, a part of an outstanding crop of corn, of the value of twenty-five cents, the personal property of H.,” is self-contradictory, and fatally defective; and neither of the descriptive averments can be struck out as surplusage.—*Smitherman v. The State*, 24.
82. *Burglary; description of building broken and entered.*—An indictment which charges that the accused broke and entered “a gin-house, the property of W. R., in which was kept, for use, sale, or deposit, seed-cotton, a thing of value,” &c., is sufficient, without an additional averment that the gin-house was specially constructed for the use to which it was applied. Under the statute (Code, § 4343), only structures of a temporary character, erected for special purposes or occasions, require such additional descriptive averment.—*Stone v. The State*, 115.
83. *Breaking into railroad car.*—In an indictment for burglary in breaking and entering a railroad car (Code, § 4344), it is not sufficient to aver that the goods in the car were therein kept “for transportation”: the averment should be, that they were kept “for transportation as freight.” The ownership of the car is also an indispensable averment.—*Graves v. The State* 134.
84. *Removing or selling mortgaged property.*—An indictment, found before the Code of 1876 became operative, charging that the defendant “did remove, conceal, or sell one yoke of oxen, personal property, for the purpose of hindering, delaying, or defrauding C. C., who had a claim thereto under a written mortgage, with a knowledge of the existence of such mortgage,” is sufficient.—*Atwell v. The State*, 61.
85. *Indorsement of prosecutor's name.*—Although the statute declares that, for the unlawful or wanton killing, disabling, or injuring certain animals

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- named, "no bill of indictment shall be found, or prosecution maintained, except upon the complaint of the owner of the stock, or his lawful agent" (Code, §§ 4409-10); yet it does not require the record to show affirmatively that the complaint was made by the owner, or by his lawful agent; and an indictment will not be struck from the files, on motion, because the name of the owner is not indorsed on it as prosecutor, although it would be quashed, on motion and proof, if it was preferred without the necessary complaint.—*Ashworth v. The State*, 120.
86. *Abusive, insulting, or obscene language in presence of female, &c.*—In an indictment for using insulting, abusive, or vulgar language in the presence of females (Code, § 4203), it is not necessary to set out the words used by the accused; nor is it necessary to prove, on the trial, that the words were heard by the females present.—*Yancy v. The State*, 141.
87. *Selling liquor to person of known intemperate habits.*—An indictment for selling liquor to a person of known intemperate habits, in the form prescribed by the Code (p. 998, No. 59), is sufficient, although it does not negative the requisition of a physician.—*Tatum v. The State*, 147.
88. *Trespass after warning.*—In an indictment for a trespass after warning (Code, § 4419), as in an action of trespass at common law, a particular description of the premises is not required; nor is it necessary to aver, either as matter of description, or as matter of venue, that they are situated in the county in which the prosecution is instituted.—*Watson v. The State*, 19.
89. *Inquiry into evidence before grand jury.*—When it appears that a competent witness was sworn and examined before the grand jury by whom the indictment was preferred, a motion to quash the indictment, or to strike it from the files, on the ground that it was found on insufficient or illegal evidence, can not be entertained.—*Washington v. The State*, 189.
90. *Indictment found at special term.*—Under the statute (Code, §§ 652-3), a circuit judge has power to convene a special term of the court, in any county in his circuit, whenever, in his opinion, a special term is necessary; the jurisdiction and authority of the court at a special term, convened in pursuance of the statute, are as plenary as at a regular term; an indictment, found by a grand jury organized at such special term, is valid, and a trial and conviction under it are neither illegal nor irregular.—*Bales v. The State*, 30.

JURORS AND JURY; GRAND AND PETIT.

91. *Objections to array of grand jury.*—The statutory provisions regulating the drawing and summoning of persons to serve as grand jurors, are expressly declared to be directory (Code, § 4759); and any departure from them, which works no injury to the accused, is no ground of objection to the whole array.—*Bales v. The State*, 30.
92. *Drawing grand jurors; defect in, how available.*—It is not necessary for the record, in a criminal case, to show affirmatively that the grand jurors were drawn in the presence of the officers to whom that duty is by law committed; if they were not so drawn, that is matter for a plea in abatement.—*Preston v. The State*, 127.
93. *Organization of grand jury.*—The statute provides that eighteen persons, neither more nor less, shall be drawn and summoned as grand jurors (Code, § 4738); and further (§ 4753), that the grand jury, when organized, shall consist of not less than fifteen: and when, of the persons regularly drawn and summoned, fifteen appear, and are ready and capable to discharge the duties of grand jurors, the grand jury should be organized with them only (§ 4754), and the court has no power to add to the number.—*Berry v. The State*, 126.
94. *Same; objection to indictment, on account of defects in.*—An indictment returned by a body organized by the court without authority of law as a grand jury, will not support a judgment of conviction.—*Ib.* 126.
95. *Same; supplying deficiency of original venire.*—When twelve of the persons

CRIMINAL LAW—*Continued.*

originally summoned as grand jurors appear and are accepted by the court, there is no error in requiring the sheriff to summon twelve other persons for the completion of the jury (Code, § 4754), although a grand jury may be composed of only fifteen persons; nor is it error to direct the summons of "good and lawful citizens from the body of the people of the county, who possess the qualifications specified in the statutes of Alabama in such case made and provided," instead of using the exact words of the statute, "qualified citizens of the county."—*Yancy v. The State*, 141.

96. *Same.*—In the organization of the grand jury, when less than fifteen of the original panel appear and are accepted, the deficiency should be supplied by summoning twice the requisite number "from the qualified citizens of the county" (Code, § 4754); and when the record shows that they were summoned, under the order of the court, "from the bystanders," the irregularity will work a reversal of a judgment of conviction under an indictment found by the grand jury thus constituted.—*Couch v. The State*, 163.
97. *Objections to grand jury, as defense to indictment.*—Under the statutes now of force (Code, §§ 4732-58, 1889-90), which are substantially the same as the provisions of the Penal Code of 1841 on the same subject (Clay's Digest, pp. 450-60), no defense or objection to an indictment can be entertained, assailing the regularity of the selecting, drawing, or summoning of the grand jurors by whom it was found, or the qualifications of those jurors, *except* that they were not drawn in the presence of the officers designated by law; and that objection must be taken by plea in abatement, filed at the term during which the indictment was found. These provisions were judicially construed in the cases of *Brooks v. The State*, 9 Ala. 9, and *Boulo v. The State*, 51 Ala. 18; and this court adheres to the construction then given to them.—*Cross v. The State*, 40.
98. *Same.*—These statutory provisions, and these judicial decisions, relate only to objections founded on any informality or irregularity in the conduct of the officers who are by law charged with the duty of drawing and summoning grand jurors, and do not apply to the action of the court in supplying deficiencies in the number of jurors, or other matter of record in the organization of the jury by the court. As to these matters, the court must act within its statutory powers, and its disregard of statutory provisions is fatal to an indictment.—*Ib.* 40.
99. *Same; number of grand jurors.*—If eighteen persons are drawn and summoned as grand jurors, as required by law, and three of them fail to appear, or, appearing, are excused, the grand jury should be organized with the remaining fifteen (Code, § 4753), and the court has no power to add to that number. If others are added, the grand jury is organized without authority of law, and all indictments found by it are vicious; but, while no valid conviction can be had under such indictment, the defect will not avail when presented collaterally. (Explaining and limiting *Finley v. The State*, 61 Ala. 201.)—*Ib.* 40.
100. *Same.*—If the grand jurors are drawn and selected by the proper officers, not from the list of householders and freeholders, as required by the statute (Code, § 4733), but from the list of registered voters, this is a mere irregularity, and furnishes no ground for reversing a judgment of conviction under an indictment found by such grand jury.—*Ib.* 40.
101. *Organization of grand jury; objections to indictment, for defects or irregularities therein.*—In the completion and organization of the grand jury, when the number of persons originally drawn and summoned is from any cause reduced below fifteen, it is the duty of the court, by an order entered on the minutes, to direct the sheriff to summon twice the number of persons necessary to supply the deficiency, and to require them to be summoned, like the original venire, not from the registered voters of the county, but from the list of householders and freeholders (Code, §§ 4754, 4734); and when the record shows a violation of these statutory provisions by the court, a judgment of conviction, under an

CRIMINAL LAW—Continued.

- indictment found by a grand jury so organized, will be reversed on error.—*Scott v. The State*, 59.
102. *Objections to indictment, on account of defects in grand jury.*—Although an indictment will be quashed, or set aside, and will not support a judgment of conviction, when the record shows that it was preferred by a body illegally organized by the court as a grand jury; as when fifteen of the original venire appear and are accepted, and the court adds three others to them (Code § 4754); yet such a defect or irregularity will not avail in a collateral proceeding, and can not be set up in defense of a proceeding to enforce a forfeited recognizance.—*Peck v. The State*, 201.
103. *Competency of petit juror, as affected by opinion as to guilt or innocence of accused.*—Under the statute (Code, §§ 4881-82), as at common law, it is good ground of challenge for cause, that the proposed juror has a fixed opinion as to the guilt or innocence of the accused, which would bias his verdict. But, at common law, this might be made a collateral issue, and proved or disproved by other evidence than the oath of the person proposed as a juror; while the statute submits the inquiry to the sworn conscience of the juror himself, and from his testimony alone the court must determine whether he is competent. Yet, if a person having a disqualifying opinion as to the guilt of the accused should procure acceptance as a juror, whether through design or ignorance on his part, a verdict of guilty, in which he participated, would be set aside by the court, on motion for a new trial, supported by proper evidence.—*Bales v. The State*, 30.
104. *Same.*—The “fixed opinion as to the guilt or innocence of the defendant, which would bias his verdict,” and render the person incompetent as a juror, must be such as would prevent him from rendering a verdict in accordance with the evidence as disclosed on the trial, and the law as pronounced by the court: an opinion founded merely on rumor, or formed on the hypothesis of the truth of the facts which he has heard, and without the hearing of other facts which may contradict them, or lessen their weight, does not disqualify him.—*Ib.* 30.
105. *Same.*—A person who says that, “from what he had heard, he had an opinion that the prisoner had killed some one, but none whether the killing was justifiable or not,” is not incompetent as a juror; nor a person who says that he “can’t help believing what he has heard.”—*Ib.* 30.
106. *Same; examination of proposed juror.*—After the court has examined a proposed juror, it is not error to refuse to allow the prisoner’s counsel to examine him, for the purpose of ascertaining whether he is not subject to challenge for cause.—*Ib.* 30.
107. *Jury not judges of the law in criminal cases.*—The jury are not, in a criminal case, the judges of the law as well as of the facts: it is their duty to receive the law from the court, and to be governed by its instructions; though they have the power, in violation of their sworn duty, to return a verdict of acquittal against the instructions of the court as to the law of the case.—*Washington v. The State*, 135.
108. *Right to poll jury; when waived.*—In all criminal cases, whether of felony or misdemeanor, the right of polling the jury is secured to either party by the statute (Code, § 4910); but this right may be waived by the prisoner, in a case of misdemeanor, or it may be lost by the failure to assert it at the proper time; and it will be considered as waived, when his counsel consent, in his presence, that the verdict of the jury may be returned to and received by the clerk during a brief recess of the court, and it is so returned and received, and the jury discharged.—*Brown v. The State*, 97.

JUSTICE OF THE PEACE; PROCEEDINGS BEFORE.

109. *Prosecution before justice; sufficiency of complaint and warrant.*—In a criminal prosecution before a justice of the peace, technical accuracy in the description of the offense, either in the complaint or in the warrant, is not required: it is sufficient under the statute (Code, §§ 4647, 4651-2),

CRIMINAL LAW—*Continued.*

as it would be without any statute, if the offense is designated by name only, or described by words from which it may be inferred.—*Brown v. The State*, 97.

110. *Criminal jurisdiction of justice in Jackson county.*—The General Assembly, in the exercise of its constitutional powers, having conferred upon justices of the peace in Jackson county, and in certain other counties specially named, "original jurisdiction, concurrent with the Circuit Court, of all misdemeanors committed in said counties respectively" (Sess. Acts 1876-7, p. 197), this grant of jurisdiction carries with it, by implication, every thing necessary to render it effectual; and in the exercise of this jurisdiction, a justice of the peace may render the same judgment that might be rendered by the Circuit Court, and, on conviction of the defendant, may impose the same sentence and punishment that might be imposed by either the court or the jury.—*Ex parte Brown*, 187.
111. *Appeal from justice; when barred.*—In a criminal case tried before a justice of the peace, in a matter within his jurisdiction, the defendant has a right of appeal, under the rules and regulations prescribed for the trial of appeals from the County Court (Code, § 4701); and no time being prescribed within which the appeal must be taken, the right is only lost by the lapse of time which would bar an appeal to this court. *Dean v. The State*, 153.

KILLING OR INJURING CATTLE WANTONLY, &c.

112. *Indorsement of prosecutor's name on indictment.*—Although the statute declares that, for the unlawful or wanton killing, disabling, or injuring certain animals named, "no bill of indictment shall be found, or prosecution maintained, except upon the complaint of the owner of the stock, or his lawful agent" (Code, §§ 4409-10); yet it does not require the record to show affirmatively that the complaint was made by the owner, or by his lawful agent; and an indictment will not be struck from the files, on motion, because the name of the owner is not indorsed on it as prosecutor, although it would be quashed, on motion and proof, if it was preferred without the necessary complaint.—*Ashworth v. The State*, 120.
113. *Justification under verbal license; charge as to.*—When the defendant, in a prosecution under this statute, justifies the killing under a verbal license or authority from the owner, and the language relied on as conferring such license is doubtful and ambiguous, it should be left to the jury to determine its meaning; and a charge asked, assuming that the language used conferred such authority, is properly refused.—*Ib.* 120.
114. *Value of animal killed, or damage to owner.*—The value of the animal killed or injured, or the amount of the damage to the owner, though material in fixing the amount of the fine, has no bearing on the question of guilt *rel non*; consequently, a charge which instructs the jury that, "if the owner has sustained no damage, they must acquit the defendant," is properly refused.—*Ib.* 120.
115. *Tender of compensation.*—When the defendant sets up a tender of compensation before the commencement of the prosecution, as authorized by the statute (§ 4411), he must show an actual tender, or an excuse for not making a tender, which is good and sufficient under the general law of tender, and must bring the money into court. That the owner claimed more than the defendant thought was full compensation, or refused to say what he would accept, is no excuse for not making a tender. It is the defendant's duty to tender a sufficient sum, and, if not accepted, he must determine the amount at his own risk.—*Ib.* 120.
116. *Amount of fine; damage.*—Under the statute prohibiting and punishing the unlawful or wanton killing or injuring of stock, &c. (Code, §§ 4409-11), it is provided that the defendant, on conviction, "shall be fined not less than twice the value of the injury," &c.; yet the statute declares also, that if the cattle were at the time doing damage to a

CRIMINAL LAW—*Continued.*

growing crop, in a field inclosed by a lawful fence, that fact may be shown "in extenuation or justification of the injury, as the jury may determine;" and the effect of this evidence may be to reduce the fine, at the discretion of the jury, below the minimum fixed by the statute. *Bass v. The State*, 108.

117. *Same.*—To make this defense available, it is not necessary for the defendant to show that the owner of the stock pulled down his fence, and turned the cattle on his growing crop.—*Ib.* 108.
118. *Form of judgment on conviction.*—In a criminal prosecution under this statute, which gives one-half of the fine to the prosecutor, or person injured, judgment should, on a conviction, be rendered in favor of the State, for the use of the county, for the whole amount of the fine, to be collected as other fines on convictions of misdemeanor. There is no authority for a severance of the judgment, nor for the award of execution as in civil cases.—*Ib.* 108.

LARCENY.

119. *Sufficiency of indictment.*—Under an indictment which charges the larceny of "sundry United States treasury-notes, or national-bank bills, the number and denomination of which are to the grand jury unknown, of the aggregate value of forty dollars," a conviction can not be had, if the evidence adduced on the trial shows that the number and denomination of the stolen bills were in fact known to the grand jury; but, if they were in fact unknown, though by reasonable diligence and inquiry they might have been ascertained, the averment is sufficient, and a conviction may be had.—*Duvall & Pelham v. The State*, 12.
120. *Proof of value of United States treasury-notes.*—The commercial value of United States treasury-notes, commonly called "greenbacks," is, as matter of law, what their face imports; consequently, under an indictment for the larceny of such a note, a conviction may be had without any proof of its value except what it purports on its face to be.—*Ib.* 12.
121. *Same; charge requiring explanation.*—Hence, also, a charge instructing the jury that, "if the evidence fails to show the value of the property alleged to have been stolen, they must acquit," although it asserts a correct general proposition, was properly refused in this case, since, without explanation, it would probably have misled the jury, in inducing the belief that extraneous evidence of the value of the stolen note was necessary.—*Ib.* 12.
122. *Larceny of growing corn or cotton.*—An outstanding crop of cotton or corn—that is, cotton or corn growing, or unsevered from the freehold—is by statute made the subject of grand larceny (Code, § 4358); but it is not the subject of petit larceny, either at common law, or by statute, being regarded as realty, or a part of the freehold.—*Smitherman v. The State*, 24.
123. *Same; sufficiency of indictment.*—An indictment which charges that the defendant "feloniously took and carried away one peck of corn, a part of an outstanding crop of corn, of the value of twenty-five cents, the personal property of H.," is self-contradictory, and fatally defective; and neither of the descriptive averments can be struck out as surplusage.—*Ib.* 24.
124. *Declarations of defendant; when not admissible as part of res gestæ.*—Where the defendant was arrested under a charge of larceny, and at first denied having any of the stolen money, but afterwards offered to tell the police officer, who professed to "know all about it," where the money was, and said, that it was buried under the hearth in his house; and the officer having failed to find the money in the place indicated, the defendant went to his house with the officer, raised a brick in the hearth, and disclosed the money; and "after pointing out the money, defendant said it was given to him by" a servant in the employment of the prosecutrix; held, that this declaration was not admissible evidence for defendant, not being explanatory of possession, nor a part of the *res gestæ*.—*Cooper v. The State*, 80.

CRIMINAL LAW.—Continued.

MURDER ; MANSLAUGHTER.

125. *Self-defense*.—To make out a case of justifiable self-defense, the evidence must show that the difficulty was not provoked or encouraged by the defendant; that he was, or appeared to be, so menaced at the time as to create a reasonable apprehension of danger to his life, or of grievous bodily harm, and that there was no other reasonable hope of escape from such present impending peril.—*Cross v. The State*, 40.
126. *Manslaughter ; self-defense*.—The charges of the court to the jury in this case, as to the constituents of manslaughter in the first and second degrees, the deceased having been killed by the defendant with a knife, in a mutual fight growing out of a sudden quarrel, and the refusal of a charge asked as to the right of self-defense, held free from error, under the former decisions of this court, and other authorities cited.—*McNeezer v. The State*, 169.
127. *Murder in second degree*.—Murder in the second degree may be committed without an intention to take life. Mere words, no matter how insulting, never reduce a homicide to manslaughter. If one strike another, not in self-defense, with intent to maim him, and death ensue; or, if one kill another without intending it, in the attempt to commit a felony; in either case, he is guilty of murder in the second degree.—*Nutt v. The State*, 180.
128. *Verdict of guilty of less offense than charged*.—A verdict finding the defendant guilty of murder in the second degree, under an indictment for murder, operates as an acquittal of the higher offense; and on a second trial, after a reversal of the judgment, he can not be convicted of murder in the first degree.—*Ib.* 180.
129. *Drunkenness as defense ; to what witness may testify*.—Whether the defendant, at the time of the homicide, was so drunk as to be incapable of forming a design or intent, is a conclusion to be drawn by the jury from all the evidence before them, and not a question of fact to which a witness may testify.—*Armor v. The State*, 173.
130. *Conduct and declarations of defendant ; when admissible against him*.—The conduct and declarations of the defendants on the evening of the homicide, from the time they came to the house where the deceased was living with her son-in-law, until the commission of the crime, are admissible evidence against them, when parts of one continuous transaction, although occurring between the defendants and the son-in-law, in the absence of the deceased, and outside the house where she was, and not shown to have any immediate connection with the crime.—*Ib.* 173.
131. *Relevancy of evidence showing feelings of deceased towards accused*.—Where the deceased was slain by the accused in a personal combat in the dark, both being freedmen, and no witness being present; and it was shown that the accused had been living in a state of fornication with the daughter of the deceased, but had just married her, and the fact of the marriage had just been communicated to the deceased, who had made threats against the accused if he did not marry her; held, that the accused should be allowed to prove, in rebuttal, that the deceased was in fact, opposed to his marriage with the girl, and was himself living in adultery with her, although she was his daughter.—*Walker v. The State*, 105.
132. *Confessions ; when voluntary and admissible*.—Where the deceased was killed by being cut with a knife, during a sudden quarrel and fight between him and the defendant; and a witness for the prosecution stated that, a short time after the difficulty, the defendant came up while witness was standing with one W. and another person, and being asked by W. "what he had done to Charlie" (meaning the deceased), said that he "had knocked him down with a stick"; that on W. saying "he had done more than that," the defendant started off, but was pursued and overtaken by W., who thereupon arrested him, and left him in charge of witness and the man who was standing with him; and that while thus in their custody, no threats or promises being made by any one,

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- the defendant said, "I have done what I never wanted to do, or intended to do: I cut Charlie's throat before he drew his knife"; held, that the confession was voluntary and admissible.—*McNeezer v. The State*, 169.
133. *Threats against deceased by third person.*—On a trial under an indictment for murder, the evidence against the accused as the slayer being entirely circumstantial (except some "alleged confessions"), he can not be allowed to prove threats made against the deceased by a third person, who had had a personal difficulty with the deceased a few months prior to the homicide, and who was shown to have evaded the service of subpoena as a witness on the inquest.—*Alston v. The State*, 173.
134. *Insanity*, as a defense in a case of homicide, see *Boswell v. The State*, 307. (*Infra*, 144-48.)

OBSCENE, ABUSIVE, OR INSULTING LANGUAGE.

135. *Constituents of offense.*—Abusive, insulting, or vulgar (i. e., obscene) language, uttered in a public highway, near enough to the premises of the prosecutor to be distinctly heard, and actually heard by his family, or by any member thereof, must be regarded as uttered in their presence (Code, § 4203), and as a violation of the statute.—*Henderson v. The State*, 193.
136. *Sufficiency of indictment, and constituents of offense.*—In an indictment for using insulting, abusive, or vulgar language in the presence of females, it is not necessary to set out the words used by the accused; nor is it necessary to prove, on the trial, that the words were heard by the females present.—*Yancy v. The State*, 141.
See, also, *Smith v. The State*, 55; *supra*, 41.

PLEAS AND DEFENSES.

137. *Plea in abatement, for insufficient averment of name of third person.*—It is not good matter for a plea in abatement, that, in stating the name of a third person in an indictment, the initial letter of his Christian name is used, instead of the name itself.—*Haley v. The State*, 83.
138. *Misnomer; plea in abatement as to.*—The defendant being indicted by the name of "Zack, alias Zachariah," and pleading in abatement that his true name was *Zucary*; and the evidence showing that, while his true name was *Zucary*, he was generally known and called by the name of *Zack*, which some of the witnesses supposed was an abbreviation of his true name; held, that the court did not err in instructing the jury, "if they believed from the evidence that he was generally and as well known by the name of *Zack* as any other," they must find the issue against the defendant; nor in refusing to charge, at the instance of the defendant, "that if he was called and known by the name of *Zack*, as an abbreviation, or initial of his proper name, and that his proper name was *Zucary*, and not *Zachariah*, or *Zack*," they must find the issue for the defendant.—*Ib.* 83.
139. *Same; waiver of.*—A plea in abatement, regularly filed, on account of a misnomer, is waived by the subsequent interposition of a demurrer, or other pleading, which, in effect, admits that the defendant is the person charged; and when so waived, this court will not inquire into the correctness of the rulings of the court below on the plea, since they could be, at most, only error without injury.—*Haley v. The State*, 89.
140. *Jeopardy.*—A defendant, in a criminal case, is never in jeopardy, when the indictment against him is so invalid that a judgment upon it would be annulled on appeal, no matter what may be the stage of the prosecution when, for that reason, it is quashed.—*Weston v. The State*, 155.
141. *Limitation of prosecution; when statute is suspended.*—When an indictment is quashed, on account of a defect in the organization of the grand jury, and another indictment is preferred, "the time which elapsed between the finding of the first and the subsequent indictment must be

CRIMINAL LAW—Continued.

- deducted from the time limited by law for the prosecution of the offense," (Code, § 4820). The expressions used in the case of *Finley v. The State* (61 Ala. 201), as to the utter invalidity of an indictment found by a body of men not legally organized as a grand jury, are not to be construed as meaning that such an indictment would not suspend the running of the statute of limitations as above provided.—*Ib.* 155.
142. *Legal advice as defense*.—In a prosecution for trespass after warning, the defendant can not be permitted to prove, for any purpose, that he entered under the advice of counsel.—*Watson v. The State*, 19.
143. *Drunkenness as defense; to what witness may testify*.—Whether the defendant, at the time of the homicide, was so drunk as to be incapable of forming a design or intent, is a conclusion to be drawn by the jury from all the evidence before them, and not a question of fact to which a witness may testify.—*Armor v. The State*, 173.
144. *Insanity as defense*.—Since an unsound mind can not form a criminal intent, which is an indispensable element of every crime, insanity, when fully proved, is a complete defense to a criminal charge; but no defense is more easily simulated, and the evidence adduced in support of it should be carefully and considerably scanned. It is difficult to lay down an absolute rule for the government of all cases, and each case must depend, more or less, on its own particular facts.—*Boswell v. The State*, 307.
145. *Same*.—Prior to the decision in *McNaghten's case*, before the House of Lords in 1843 (10 Cl. & F. 200), the test of insanity, as a defense to a criminal charge, was, in the great majority of English cases, held to be the capacity to know right from wrong. But the rule laid down in that case, which this court adopts, as applicable to cases of insane delusion, or partial insanity, holds a person not responsible criminally for an act committed under the influence of an insane delusion existing in his mind at the time, *when* (and *only when*) the fact, or state of facts, the existence of which he believes under such insane delusion, would, if actually existing, justify or excuse the act.—*Ib.* 307.
146. *Same*.—To justify the inference of insanity, such as will justify or excuse a homicide, from the calmness of manner and indifference to results, which sometimes mark the conduct of such persons, there should be convincing evidence of previous insanity, or insane delusions, so recent as, when coupled with the causelessness of the killing, to raise the presumption that the paroxysm had not entirely passed away. On the other hand, calmness, indifference to results, and consciousness of the criminality of the act, with connectedness in the employment of the reasoning faculty, while not conclusive, are strong circumstances tending to prove legal accountability.—*Ib.* 307.
147. *Same*.—Moral insanity, which consists of irresistible impulse, co-existing with mental sanity, has no support either in psychology or in law. *Ib.* 307.
148. *Same; burden and measure of proof*.—The law presumes sanity, and that presumption must prevail until it is overcome; and when insanity is set up as a defense in a criminal case, whether the evidence of it arises out of the testimony which proves the commission of the act, or is shown *abunde*, it is insufficient until it overturns the presumption of sanity. (*The State v. Marler*, 2 Ala. 43, and *Brinyea v. The State*, 5 Ala. 241, commented on, as self-repugnant on this question.)—*Ib.* 307.
149. *Election by prosecutor; when may be compelled*, see *Bass v. The State*, 108; *McCullough v. The State*, 75.
150. *Defects in organization of grand jury; when available as defense to indictment*, see *Bales v. The State*, 30; *Cross v. The State*, 40; *Scott v. The State*, 59; *Berry v. The State*, 126; *Preston v. The State*, 127; *Yancy v. The State*, 141; *Couch v. The State*, 163.

PUBLIC ROADS; OFFENSES RELATING TO.

151. *Failure to work public road; sufficiency of statement, or complaint*.—When

CRIMINAL LAW—Continued.

the affidavit or complaint before the justice of the peace, by which the prosecution is commenced, charges the defendant with "the offense of failing to work the road," a statement, or complaint, filed in the Circuit Court on appeal, which charges that "he did willfully fail and refuse, after legal notice, to work the public road, either in person or by substitute, without a sufficient excuse therefor, and being liable to road duty," is not a departure; nor is it demurrable, because it does not describe the road, nor otherwise insufficient or defective.—*Brown v. The State*, 97.

152. *Evidence of list of hands for road duty.*—The list of hands for road duty, presented by the apportioners to the overseer, would not, if produced, be evidence of the defendant's liability to road duty, nor of any other material fact in the prosecution against him for failing to work the road; consequently, the fact that his name was on the list may be proved by oral evidence.—*Ib.* 97.
153. *Neglect of overseer to repair public road; excuses.*—It being shown that the road was out of repair for more than ten consecutive days, and that the overseer had failed to have it worked ten days in the year by the persons subject to his control for that purpose, this makes out an indictable neglect of duty on his part (Code, §§ 1649, 4252); and neither the character of the soil, preventing permanent repairs, nor the fact that no one has been injured or hindered by the bad condition of the road, constitutes any excuse for the default.—*McCullough v. The State*, 75.
154. *Same; indictment.*—An indictment against the overseer of a public road, which alleges that he "failed to discharge his duties as such overseer," without averring any particular failure or neglect of duty by him, is made sufficient by the statute (Code, § 4810), although it would be fatally defective at common law.—*Ib.* 75.
155. *Evidence under such indictment; conclusiveness of judgment.*—Under such a general indictment, not specifying any particular neglect of duty, the State is not confined to evidence of any one particular act or neglect of duty, but may give evidence as to any and every neglect within the period covered by the indictment; and the judgment will be a bar to another prosecution for any of such acts which might have been proved, though no evidence was in fact offered in reference to them.—*Ib.* 75.

RAPE, AND CARNAL ABUSE OF CHILD.

156. *Competency of child as witness.*—Held, in this case, that a little negro girl, about nine years old, was improperly permitted to testify as a witness, when the only evidence as to her competency was, that in answer to questions put to her by defendant's counsel, she said, "that she did not know what the Bible was; had never been to church but once, and that was to her mother's funeral; did not know what book it was she laid her hand on when sworn; had heard tell of God, but did not know who it was; and said, if she swore to a lie, she would be put in jail, but did not know she would be punished in any other way."—*Carter v. The State*, 52.

REMOVING OR SELLING MORTGAGED PROPERTY.

157. *Constituents of offense, and relevancy of evidence in defense.*—A conviction can not be had for selling or removing mortgaged property (Code, § 4353), unless the defendant sold or removed the property for the purpose of hindering, delaying, or defrauding the mortgagee. If he removed and sold it for the purpose of raising money to pay the mortgage debt, honestly believing that the mortgagee assented to such removal and sale, and having just cause so to believe, he is not guilty; and with a view of showing such a state of facts, having proved a conversation had with the mortgagee's agent, by whom the mortgage was taken, with reference to the proposed removal and sale, he should be allowed to prove facts tending to show the general authority exercised by the agent

CRIMINAL LAW—Continued.

- in and about the mortgagee's business, from which he might infer that the agent had authority to assent to such removal and sale, although the agent and his principal both deny such authority.—*Atwell v. The State*, 61.
158. *Sufficiency of indictment*.—An indictment, which was found before the Code of 1876 became operative, charging that the defendant "did remove, conceal, or sell one yoke of oxen, personal property, for the purpose of hindering, delaying, or defrauding C. C., who had a claim thereto under a written mortgage, with a knowledge of the existence of such mortgage," is sufficient.—*Ib.* 61.
159. *Admissibility of defendant's declarations as evidence for him*.—The declarations of the defendant while negotiating a sale of the mortgaged property, to the effect that he had obtained the mortgagee's permission to sell, are not competent evidence for him when criminally prosecuted for making the sale.—*Ib.* 61.

RETAILING SPIRITUOUS LIQUORS.

160. *Selling liquor "drunk on or about the premises."*—*Held*, on the authority of *Pearce v. The State* (40 Ala. 720), that the defendant was properly convicted of selling liquor "drunk on or about his premises" (Code, § 4204), on proof that the liquor was sold from a jug which he had, in a field where he was working with others, more than a mile from his house, and in the plantation of another person, over which he had no control.—*Powell v. The State*, 177.
161. *Selling liquor to person of known intemperate habits; constituents of offense*. To authorize a conviction under an indictment for selling liquor to a person of known intemperate habits (Code, § 4205), it is essential that three facts shall be proved: 1st, that the defendant sold spirituous, vinous, or malt liquor to the person named; 2d, that such person was of intemperate habits; and, 3d, that the defendant had knowledge of his intemperate habits.—*Tatum v. The State*, 147.
162. *Same; indictment*.—An indictment for selling liquor to a person of known intemperate habits, in the form prescribed by the Code (p. 998, No. 59), is sufficient, although it does not negative the requisition of a physician.—*Ib.* 147.
163. *Same; how proved*.—Neither the sale of the liquor, nor the intemperate habits of the person to whom it was made, can be proved by general character, general reputation, or general notoriety in the community; but such evidence is admissible to prove the defendant's knowledge of such intemperate habits, on the theory that what is generally known in the community is evidence, to be weighed by the jury, in determining whether it is known to the accused; yet such evidence is not conclusive.—*Ib.* 147.
164. *"Intemperate habits;" what constitutes*.—"Intemperate habits," within the meaning of the statute, can not be predicated of a person who occasionally drinks to excess. But it is not necessary to show that he is drunk every day. If sobriety is the rule, and occasional intoxication the exception, he is not within the statute; and, on the other hand, if the habit is to drink to intoxication when occasion offers, and sobriety or abstinence is the exception—as when one is accustomed to remain sober while at home, but generally drinks to excess when in company, or when visiting the town or village—the charge of intemperate habits is sustained.—*Ib.* 147.
165. *How proved*.—Intemperate habits is a collective fact, to which a witness may testify, if he has sufficient knowledge; and the person to whom the liquor was sold may himself testify whether he is or is not of intemperate habits.—*Ib.* 147.
166. *Same*.—A person, knowing the fact, may testify that the intemperate habits of the person to whom the liquor was sold, were generally known in the neighborhood in which the sale was made.—*Ib.* 147.

CRIMINAL LAW—*Continued.*

TRESPASS AFTER WARNING.

167. *Sufficiency of indictment, in description of premises.*—In an indictment for a trespass after warning (Code, § 4419), as in an action of trespass at common law, a particular description of the premises is not required; nor is it necessary to aver, either as matter of description, or as matter of venue, that they are situated in the county in which the prosecution is instituted.—*Watson v. The State*, 19.
168. *Constituents of offense.*—The statute was intended to protect the possession of real estate, against the entry of intruders or trespassers; and it can not be made to serve the purposes of an action of trespass or ejectment. If the defendant, when warned by the prosecutor not to enter, was himself in possession of the premises; or if, at the time of his entry after warning, the title and right of entry resided in him; in either case, no conviction can be had against him. But no mere claim of title, however honestly made, can justify or excuse the trespass, if committed after warning.—*Ib.* 19.
169. *Legal advice as defense.*—In a prosecution under this statute, the defendant can not be permitted to prove, for any purpose whatever, that he entered under the advice of counsel.—*Ib.* 19.
170. *Warning, or notice, and proof thereof.*—The warning not to enter, like the notice to quit given by a landlord to his tenant, may be either verbal or written; and when in writing, a copy of it may be used as evidence, without notice to produce the original.—*Ib.* 19.

TRIAL, AND ITS INCIDENTS.

171. *Service of copy of indictment on prisoner; variance.*—When the defendant is charged with a capital offense, and is in actual confinement, the statute requires that he be served with a copy of the indictment, and of the list of jurors summoned for his trial (Code, § 4872); and if there is a material variance between the original indictment and the paper served as a copy, in the name of the deceased—as, *Luke Habbett* instead of *Luke Hodnett*—this is not a compliance with the statute, and the defendant should not be ruled to trial.—*Null v. The State*, 180.
172. *Quashing indictment, that another may be preferred.*—When the record shows an irregularity in the organization of the grand jury, for which a judgment of conviction would be reversed on error or appeal, although the defect is not discovered until after the trial has commenced, the court may quash the indictment (Code, § 4819), and order the case to be brought before another grand jury.—*Weston v. The State*, 155.
173. *Asking defendant if he has anything to say in arrest of judgment; correcting judgment entry.*—When the judgment entry, in a case of felony, recites that the defendant was asked by the court if he had anything to say in bar or preclusion of judgment, the recital imports absolute verity, and testimony can not be received to impeach it; and motion being made to correct the entry in this particular, supported by affidavits, and overruled by the court on the evidence adduced, this court cannot revise its ruling on bill of exceptions.—*Gray v. The State*, 66.
174. *Right to poll jury; when waived.*—In all criminal cases, whether of felony or misdemeanor, the right of polling the jury is secured to either party by the statute (Code, § 4910); but this right may be waived by the prisoner, in a case of misdemeanor, or it may be lost by the failure to assert it at the proper time; and it will be considered as waived, when his counsel consent, in his presence, that the verdict of the jury may be returned to and received by the clerk during a brief recess of the court, and it is so returned and received, and the jury discharged.—*Brown v. The State*, 97.
175. *Election by prosecution; when may be compelled,* see *Bass v. The State*, 108; *McCullough v. The State*, 75.

CRIMINAL LAW—Continued.

VERDICT, AND JUDGMENT.

176. *Verdict of guilty of less offense than charged.*—A verdict finding the defendant guilty of murder in the second degree, under an indictment for murder, operates as an acquittal of the higher offense; and on a second trial, after a reversal of the judgment, he can not be convicted of murder in the first degree.—*Nutt v. The State*, 180.
177. *Verdict and sentence on conviction of burglary.*—Under an indictment for burglary, and a verdict of guilty as charged in the indictment, not fixing the punishment (Code, §§ 4343, 4450), the court may impose a sentence to confinement in the penitentiary at hard labor for two years. *Washington v. The State*, 189.
178. *Form of judgment on conviction, where part of fine goes to person injured.* In a criminal prosecution under a statute, which gives one-half of the fine to the prosecutor, or person injured (as under Code, §§ 4409-10), judgment should, on a conviction, be rendered in favor of the State, for the use of the county, for the whole amount of the fine, to be collected as other fines on convictions of misdemeanor. There is no authority for a severance of the judgment, nor for the award of execution as in civil cases.—*Bass v. The State*, 108.

CUSTOM.

1. *As to contribution for party-wall.*—"The custom and practice of lot-owners in the city of Mobile," as to contribution or compensation between the owners of adjacent lots for the cost of a party-wall between them, can not be received to affect their legal rights; and if such custom or usage were valid, it is not sufficiently pleaded by an averment that it has been "constantly and uniformly recognized and abided by in said city in similar cases."—*Antomarchi's Ex'r v. Russell*, 356.

DAMAGES.

1. *In action for personal injuries.*—In an action on the case to recover damages for a private and personal injury caused by a nuisance, each day's continuance of the nuisance being an independent cause of action, there can be, generally, no recovery for injury suffered after the commencement of the suit; but, when the action is brought for an injury to the person, caused by a negligent or wrongful act not continuous in its nature, for which but one action can be maintained, the plaintiff may recover compensation for the disabling effects of the injury, prospective as well as past.—*S. & N. Ala. Railroad Co. v. McLendon*, 266.
2. *Same.*—In such action, to recover damages for an injury to the person, the jury may, in estimating the damages, consider the expenses of the cure; and the proper cost of future treatment or nursing, when the injury is permanent or irremediable; and the loss of time up to the verdict; and probable future loss, or incapacity to do as profitable labor as before; and suffering, mental and physical, proximately caused by the injury.—*Ib.* 266.
3. *Exemplary damages.*—In an action against a railroad company, to recover damages for personal injuries caused by the failure and neglect to keep in proper repair a bridge over a public highway, the plaintiff may recover exemplary or punitive damages, if the negligence was gross; and the degree of negligence is a question for the determination of the jury, under proper instructions from the court.—*Ib.* 266.
4. *Attorney's fees as damages.*—In an action on an attachment bond, conditioned to "prosecute the attachment to effect, and pay the defendant all such damages as he may sustain from the wrongful or vexatious suing out of such attachment" (Code, § 3256), attorney's fees for services rendered in bringing the action can not be recovered. (Overruling *Burton v. Smith*, 49 Ala. 293.)—*Copeland & Brantley v. Cunningham*, 394.
5. *Special supersedeas bond; what damages may be recovered.*—A special bond,

DAMAGES—*Continued.*

executed by the defendant in a statutory action of ejectment, on appeal from a judgment for the plaintiff for the possession of the land, with damages and costs, conditioned that he "shall prosecute said appeal to effect, and pay and satisfy such judgment as the Supreme Court may render in the case" (Code, §§ 3927-28).—is fatally defective to supersede the judgment for the land; and the judgment being affirmed on the appeal, and the costs and damages paid, an action can not be maintained on the bond, to recover the rents of the land pending the appeal, or attorneys' fees for services rendered on the appeal. (BRICEKIL, C. J., dissenting.)—*Steele v. Tuttle*, 368.

6. *Same.*—On appeal from a decree in chancery, which ordered a fund in court to be distributed equally among five claimants, two of whom claimed the whole fund; a special *supersedeas* bond being required by the chancellor (Code, § 3928), from any claimant who desired to appeal, conditioned to "prosecute the appeal to effect, and pay such costs and damages as the other parties to the cause may sustain by reason of such appeal, if the said decree is affirmed;" the decree being affirmed, and an action at law brought on the bond; *held*, that the plaintiff was entitled to recover, as damages, interest on his proportionate part of the money in the hands of the register, during the pendency of the appeal, and a reasonable attorney's fee for services rendered on the appeal.—*Drake v. Webb*, 596.

DEEDS.

1. *Execution and attestation.*—When the grantor subscribes his own name to a conveyance, the attestation of one witness only is necessary to its valid execution (Code, § 2145); and if a person who is present writes his name as a subscribing witness, under the proper attestation clause, with the knowledge of the parties, and without objection from them, though without their request, and the deed is thereupon delivered and accepted, this is a sufficient attestation; and the validity of the conveyance, thus executed, attested, and delivered, is not affected by an informal certificate of acknowledgment, subsequently written on it by the person who had signed his name as attesting witness.—*Clements v. Pearce*, 284.
2. *Description of lands in conveyance; parol evidence in aid of.*—In a conveyance of lands, if the description of the premises is so inaccurate, vague, and indefinite, that their identity is wholly uncertain, the deed is void, and parol evidence can not be received to cure the deficiency; but, before pronouncing the deed void on its face, the court should receive parol evidence of the circumstances surrounding the parties at the time, having relation to the subject-matter of the deed, and interpret the words of the deed in the light of those circumstances, if thereby the indefiniteness and uncertainty may be removed.—*Ib.* 284.
3. *Same.*—The rule is of very general application, that if the premises intended to be conveyed clearly appear from any part of the description in the deed, the conveyance will not be defeated because other circumstances of description are added, which are inapplicable, or incapable of a definite application: the latter will be rejected, and full effect given to the former words.—*Ib.* 284.

DEPOSITIONS.

1. *In criminal cases.*—The statutory provisions which authorize the taking of depositions in criminal cases (Code, §§ 4932-35), apply only to cases pending in court, and not to preliminary examinations before committing magistrates.—*Couch v. The State*, 163.
2. *Deposition taken de bene esse; when suppressed, or not.*—When the deposition of a witness is taken, on the statutory ground that the defense, or a material part thereof, depends exclusively on his testimony (Code, §§ 3069, 3078), the deposition may be read in evidence on the trial, although the plaintiff makes the necessary affidavit requiring his per-

DEPOSITIONS—*Continued.*

- sonal attendance, if it is affirmatively shown to the court that the witness is incapable, both physically and mentally, of attending and testifying in person.—*Henry & Co. v. Northern Bank of Alabama*, 527.
3. *Same.*—When the deposition of a witness is taken, on the statutory ground that the defense, or a material part thereof, depends exclusively on his testimony (Code, §§ 3069, 3078), and is offered in evidence on the trial, by the plaintiff, it will be suppressed, on motion, if the witness is shown to be alive, and to reside within the county where the court is held.—*M. & C. Railroad Co. v. Maples*, 601.
 4. *When motion to suppress may or must be made.*—A motion to suppress a deposition, or a portion thereof, for defects or causes which may be remedied on a re-examination of the witness, must be made before the trial is begun; but illegal evidence may be suppressed and excluded at any stage of the cause, when it does not appear that it could be rendered legal on a re-examination of the witness.—*Ib.* 601.

DETINUE.

1. *Against whom action lies.*—Ordinarily, an action of detinue can only be maintained against the person who has possession of the chattel at the commencement of the suit; and it may, perhaps, be maintained against a person who has transferred the chattel to another, with intent to evade an action by the owner; yet, to a special plea denying the defendant's possession at the commencement of the suit, a replication averring that he was in possession a short time before the commencement of the suit, "and wrongfully parted with the possession after notice and demand by said plaintiff," does not bring the cause within this principle, and is demurrable.—*Lightfoot v. Jordan*, 294.

DISCONTINUANCE.

1. *Sci. fa. against bail.*—A proceeding by *scire facias* against bail, on a forfeited recognizance, is not discontinued by the unexplained failure of the court to take action on it for one or more terms.—*Hunt v. The State*, 196.

EJECTMENT.

1. *What title will support action.*—An equitable title will not support ejectment, nor the corresponding statutory action: the plaintiff can not recover on proof of a purchase at a sale made by an assignee in bankruptcy, not followed by a conveyance; nor as the assignee of a mortgage, without showing a deed from the mortgagee, either indorsed on the mortgage, or by a separate instrument.—*Furley, Spear & Co. v. Whitehead*, 295.
2. *Abatement and revivor of action.*—In ejectment, or the corresponding statutory action, if the sole plaintiff dies, or if one of several plaintiffs dies, the revivor may be in the name of his personal representative alone, or in the names of his heirs or devisees, or in the names of both the personal representative and the heirs or devisees, to be determined by the extent of the recovery sought—whether the land only, or also damages accruing prior and subsequent to the death of the original plaintiff.—*Evans v. Welch*, 250.
3. *Title of purchaser at sheriff's sale under execution; proof of outstanding title by defendant.*—In ejectment, or the corresponding statutory action, by a purchaser at sheriff's sale under execution on a judgment at law, he must prove that the defendant in execution had such an estate or interest in the lands, at the time of the levy, as was subject to levy and sale; and the defendant in the action, although he was also the defendant in execution, may defeat a recovery by showing that, notwithstanding his possession at the time of the levy and sale, he did not have such an interest as was subject to the execution.—*Clements v. Pearce*, 284.

ELECTION. See CONTESTED ELECTIONS ; CRIMINAL LAW, 75, 155.

ERROR AND APPEAL.

1. *When appeal lies.*—Under the act “to regulate the trial of misdemeanors in Madison county,” approved February 9th, 1877, an appeal lies directly to this court, from the judgments of said County Court, in criminal cases commenced in that court, as well as in cases transferred to it from the Circuit Court under the provisions of that act.—*Caethorn v. The State*, 157.
2. *Judgment on facts ; when not reversed.*—On appeal from the judgment of the County Court, in a cause which was tried before the judge without a jury, if the record shows that the judgment is founded upon conflicting oral testimony, this court will not disturb it, unless it is manifestly wrong.—*Ib.* 157.
3. *When note is not part of record.*—In an action on a promissory note, which, as copied in the transcript by the clerk, but without being made a part of the record by bill of exceptions, is variant from the note described in the complaint, this court will not look to it for any purpose, but will be governed by the averments of the complaint.—*Smith v. Kennedy*, 334.
4. *Amendment of judgment, by correcting error in calculation of interest.*—On appeal from a judgment by *nil dicat*, in an action on a promissory note, a clerical misprision in the calculation of interest, being amendable *nunc pro tunc*, on motion, in the court below, will be amended by this court at the cost of the appellant, and the amended judgment affirmed.—*Ib.* 334.
5. *Error without injury in rulings against plaintiff.*—When the record shows, affirmatively and clearly, that the plaintiff never can recover in the action, this court will not reverse at his instance, on account of any erroneous rulings adverse to him, since they can work no injury; but this rule will not be applied, when the bill of exceptions does not purport to set out all the evidence, although the plaintiff's evidence, as therein set out, is indefinite and insufficient.—*Farley, Spear & Co. v. Whitehead*, 295.
6. *Same.*—When the plaintiff has recovered a verdict and judgment for a greater amount than, on the undisputed facts in evidence, he was entitled to recover, this court will not, at his instance, inquire into the correctness of any of the rulings of the court adverse to him.—*Henry & Co. v. Northern Bank of Alabama*, 527.
7. *What objections avail on error.*—A decree enforcing a vendor's equitable lien on land in favor of an assignee or transferee of the notes for the purchase-money, will not be reversed on error, because the record does not affirmatively show that the lien passed to him by the transfer of the note, when that question was not raised in the court below.—*Barnett v. Riser's Executor*, 347.
8. *Remandment, on reversal, for amendment of bill.*—When the chancellor overrules a demurrer to the bill for want of equity, and, on final hearing on pleadings and proof, renders a decree for the complainant ; this court, on reversing his decree, and holding the bill demurrable, will remand the cause, in order to give the complainant an opportunity to ask leave to amend in the court below, unless the defects are not capable of amendment.—*Wilburn & Co. v. McCalley*, 436.
9. *Presumption in favor of judgment.*—When the admissibility of evidence of an act depends upon the time when it was done, and the record does not show the time, this court will indulge the presumption necessary to support the ruling of the court below.—*Muck v. The State*, 138.
10. *Amendment of judgment on error.*—In *scire facias* against bail on a forfeited recognizance, if the record shows that the *scire facias* was returned executed on all the recognizers but one, and judgment final was taken against all, without two returns as to the one not found, this court will amend the judgment by discontinuing the proceeding as to him, if the record shows no other error.—*Hunt v. The State*, 196.

ESTATES OF DECEDENTS.

1. *Decedent's lands ; title and rights of heir, as affected by statutory powers of personal representative.*—On the death of a person intestate, seized of a heritable estate in lands, the title descends *eo instanti*, and vests in the heir, and with it all the common-law rights and incidents of ownership, subject to the exercise by the administrator of the statutory powers with which he is clothed for the purposes of administration ; and until these statutory powers are effectively asserted by the administrator, the title and rights of the heir remain unimpaired and unaffected.—*Calhoun v. Fletcher*, 574.
2. *Same ; when heir may maintain action for trespass on lands.*—The heir may maintain an action at law for a trespass on lands descended to him, although the administrator had, prior to the commission of the trespass, obtained an order to sell them for the payment of debts, but had never sold them under the order, nor otherwise exercised any of his statutory powers over them, and had resigned his administration before the commencement of the action.—*Ib.* 574.
3. *Widow's interest in goods of deceased husband's estate, before administration granted.*—The widow has such an interest in the personal chattels belonging to the estate of her deceased husband, before letters of administration have been granted on the estate, that a conviction may be had under the statute against any one who, by any false pretense, obtains possession of them from a bailee, with intent to injure or defraud her.—*Mack v. The State*, 138.
4. *Widow's interest in exempt personal property.*—The act “to regulate property exempt from sale for the payment of debts,” approved April 23, 1873 (Sess. Acts 1872–3, p. 64), exempted from liability for the debts of the deceased husband, in favor of his surviving widow, “personal property to the value of one thousand dollars” belonging to his estate ; and this right accrued to the widow on the death of the husband, although she only survived him a few days. But the statute did not vest in her the title to any specific property, as so exempt ; until a selection was made by her, the personal representative, or commissioners appointed by the judge of probate, she had no title to any specific property, for which she could maintain trover against the husband's administrator ; nor could her personal representative maintain such action.—*Tucker v. Henderson's Adm'r*, 280.
5. *Same.*—The act approved April 23, 1873 (Sess. Acts 1872–3, pp. 64–69), by its 6th section, exempted from liability to debts or administration, for the benefit of the decedent's widow, or minor child or children, besides other things, personal property which was supposed to be necessary for present subsistence, use, and consumption, and books, family portraits, &c., which had an especial value to the family ; and as to these articles, the right of exemption is not dependent on the solvency or insolvency of the estate, nor did any title to them pass to the personal representative.—*Davis v. Davis*, 293.

See, also, EXECUTORS AND ADMINISTRATORS.

ESTOPPEL. See CORPORATIONS, 3.

EVIDENCE.

ADMISSIONS ; CONFESSIONS ; DECLARATIONS ; HEARSAY ; RES GESTÆ.

1. *Agent's declarations ; admissibility against principal.*—In an action against an incorporated bank, the declarations or admissions of its president can not be received to establish a liability against it.—*Henry & Co. v. Northern Bank of Ala.*, 527.
2. *Same.*—The declarations or statements of an agent, having authority only to demand and receive from the defendant the property sued for, made to third persons, after a refusal to deliver by the defendant, in derogation of the title of plaintiff, his principal, are not competent evidence against plaintiff.—*Bynum v. Southern Pipe and Pump Co.*, 462.

EVIDENCE—Continued.

3. *Same*; *admissibility against principal or his sureties*.—The admission of an agent, not made at the time of doing an act in the exercise of his authority, nor explanatory of any contemporaneous act in the execution of his agency, is not competent evidence against his principal, nor against his principal's sureties.—*M. & C. Railroad Co. v. Maples*, 601.
4. *Admission as to testimony of absent witnesses*.—On application for a continuance in a criminal case by the defendant, on account of the absence of material witnesses, the court may, in its discretion, require the State to admit the truth of the facts proposed to be proved by the absent witnesses, or simply to admit that the witnesses, if present, would testify to the facts as stated; but, whether the admission be in either form, it is equally conclusive for the purposes of the trial.—*Peterson v. The State*, 113.
5. *Same*.—If one of the absent witnesses should come into court, and be examined during the trial, a contradiction, or inconsistency, between his testimony and the admission as to what his testimony would be, is immaterial, and cannot be considered by the jury in determining the effect of the admission as to the testimony of the other absent witnesses. *Ib.* 113.
6. *Answer, or decree pro confesso*; *effect as evidence against co-defendant*.—Neither the answer of one defendant to a bill, nor a decree *pro confesso* against him, can have any effect as evidence against a co-defendant, who claims under a conveyance from the former executed before the filing of the bill.—*Thames & Co. v. Rembert's Adm'r*, 561.
7. *Admissibility of confessions*.—Although the more recent authorities favor the admissibility of confessions, unless they are shown to have been made under the influence of promises or threats on the part of an officer of the law; yet this court, constrained by its former decisions, holds a confession inadmissible, when induced by hope or fear excited in the mind of the accused, by the representations of any person connected with the prosecution, or with the accused himself, who, considering his relations and condition, may fairly suppose that such person has power to secure the performance of his promises or threats; and excludes the confessions of the accused in this case, made while he was in jail under a charge of burglary, to a clerk in the storehouse alleged to have been broken and entered, who was also a part owner of the goods said to have been stolen from it, and induced by his promises not to prosecute the accused, and not to appear as a witness against him unless compelled. *Murphy v. The State*, 1.
8. *Same*; *when corroborated*.—When the confession of the accused is corroborated by extraneous facts—as, in this case, by the discovery of a part of the stolen goods, in consequence of a statement made by him, in the possession of a particular person recently after the burglary—it is competent to prove to the jury his statement and the corroborating fact of the discovery; but this does not render competent his confession, at the same time, that he committed the burglary and larceny, if such confession was improperly procured by promises or threats.—*Ib.* 1.
9. *Confessions*; *when voluntary and admissible*.—Where the deceased was killed by being cut with a knife, during a sudden quarrel and fight between him and the defendant: and a witness for the prosecution stated that, a short time after the difficulty, the defendant came up while witness was standing with one W. and another person, and being asked by W. "what he had done to Charlie" (meaning the deceased), said that he "had knocked him down with a stick;" that, on W. saying "he had done more than that," the defendant started off, but was pursued and overtaken by W., who thereupon arrested him, and left him in charge of witness and the man who was standing with him; and that while thus in their custody, no threats or promises being made by any one, the defendant said, "I have done what I never wanted to do, or intended to do: I cut Charlie's throat before he drew his knife;" *held*, that the confession was voluntary and admissible.—*McNeener v. The State*, 169.

EVIDENCE—Continued.

10. *Conduct and declarations of defendant; when admissible against him.*—The conduct and declarations of the defendants on the evening of the homicide, from the time they came to the house where the deceased was living with her son-in-law, until the commission of the crime, are admissible evidence against them, when parts of one continuous transaction, although occurring between the defendants and the son-in-law, in the absence of the deceased, and outside the house where she was, and not shown to have any immediate connection with the crime.—*Armor v. The State*, 173.
11. *Admissibility of defendant's declarations, as evidence for him.*—As a general rule, a person charged with crime can not make evidence for himself, by proof of his own declarations; and when they are admitted as evidence for him, it is as part of the *res gestæ*, or under some other recognized exception to the general rule.—*Stewart v. The State*, 199; *Atwell v. The State*, 61.
12. *Same.*—Where the defendant was arrested under a charge of larceny, and at first denied having any of the stolen money, but afterwards offered to tell the police-officer, who professed to "know all about it," where the money was, and said, that it was buried under the hearth in his house; and the officer having failed to find the money in the place indicated, the defendant went to his house with the officer, raised a brick in the hearth, and disclosed the money; and "after pointing out the money, defendant said it was given to him by" a servant in the employment of the prosecutrix; held, that this declaration was not admissible evidence for defendant, not being explanatory of possession, nor a part of the *res gestæ*.—*Cooper v. The State*, 80.
13. *General reputation, in prosecution against retailer.*—Under an indictment for selling liquor to a person of known intemperate habits, neither the sale of the liquor, nor the intemperate habits of the person to whom it was made, can be proved by general character, general reputation, or general notoriety in the community; but such evidence is admissible to prove the defendant's knowledge of such intemperate habits, on the theory that what is generally known in the community is evidence, to be weighed by the jury, in determining whether it is known to the accused; yet such evidence is not conclusive.—*Tatum v. The State*, 147.
14. *Declarations not to be garbled.*—To make out a threatened or apprehended attack, as a defense to a prosecution for carrying concealed weapons (Code, § 4109), the defendant offered in evidence a letter written by the prosecutor to the chief of police, in which the writer stated "that he did not wish to violate the law, nor to be arrested for violating the law, but that he understood the defendant had made threats against him, and was therefore carrying a pistol concealed about his person." Held, that the contents of the letter could not be garbled by the defendant, but must be taken altogether as written; and that the court properly refused a charge, requested by him, to the effect "that what was said in the letter about any threats made by him could not be considered by the jury as evidence."—*Shorter v. The State*, 129.
15. *Standard medical treatises as evidence.*—The principle is settled by former decisions of this court, that standard medical books, in connection with proper explanation, when necessary, of the terms used, may be read to the jury as evidence in a criminal case.—*Bales v. The State*, 30.

ADMISSIBILITY AND RELEVANCY,

16. *Agency; how proved.*—Agency can not be proved by the mere declarations of the person assuming to act as agent, though it may be inferred from his previous employment in similar acts, or from subsequent acquiescence.—*Womack v. Bird*, 500.
17. *Rules and instructions to railroad agents; relevancy as evidence on question of agent's default.*—In an action by a railroad company, against the sureties on a bond given by one of its depot-agents, to recover for an alleged default of their principal for money received and not accounted for, the

EVIDENCE—Continued.

- instructions given by the company to such agents, requiring them to make monthly reports, are not relevant or competent evidence for the plaintiff, when it does not appear that the alleged default is shown by the monthly reports of the agent, nor that he violated his duty in failing to make such reports.—*M. & C. Railroad Co. v. Maples*, 601.
18. *Proof of insanity*.—On the question of insanity *vel non*, sleeplessness and nervous restlessness are admissible evidence; inconclusive, of course, but still a circumstance to be weighed by the jury.—*Boswell v. The State*, 307.
 19. *Proof of insolvency*.—Judgments confessed by the original purchaser, before the goods have reached their destination, and executions levied on his property the day after their rendition, tend to prove his insolvency, and are admissible evidence for that purpose, in an action brought by the seller, claiming the right of stoppage *in transitu*, against a sub-purchaser.—*Loeb & Bro. v. Peters & Bro.*, 243.
 20. *Same; evidence of want of good faith by sub-purchaser*.—That the sub-purchaser, when he took a transfer of the bill of lading for the goods, had knowledge of the original purchaser's insolvency, is a fact tending to show that he did not purchase in good faith, and is admissible for that purpose in a contest with the original vendor.—*Ib.* 243.
 21. *Plat and survey by county surveyor*.—A survey of lands, made by a county surveyor without notice to the party in adverse interest, is not legal evidence against him (Code, § 868); but it would be admissible evidence in connection with the testimony of the surveyor himself as to its correctness.—*Clements v. Pearce*, 284.
 22. *Threatened or apprehended attack; relevancy of evidence as to*.—To make out the defense of a threatened or apprehended attack, within the statutory exception, the motive (or purpose) of carrying the weapon must be defense against violence, threatened or apprehended; and as bearing on this question, the conduct and declarations of the accused and the prosecutor, during an altercation and subsequent rencontre between them, out of which the prosecution arose, are relevant and competent evidence.—*Porter v. The State*, 129.
 23. *Same*.—To establish the defense of a threatened attack, the threat must be real, and not simply apparent, or simulated; but, to make out an apprehended attack, it is sufficient to show facts which may convince the jury that he had good reason to apprehend an attack—as reports of threats, believed to be true, though not true in fact; hostile demonstrations; preparations for attack, real or apparent, and the entire conduct of the parties.—*Ib.* 129.
 24. *Threats against deceased by third person*.—On a trial under an indictment for murder, the evidence against the accused as the slayer being entirely circumstantial (except some "alleged confessions"), he can not be allowed to prove threats made against the deceased by a third person, who had had a personal difficulty with the deceased a few months prior to the homicide, and who was shown to have evaded the service of subpoena as a witness on the inquest.—*Alston v. The State*, 178.
 25. *Relevancy of evidence showing feelings of deceased towards accused*.—Where the deceased was slain by the accused in a personal combat in the dark, both being freedmen, and no witness being present; and it was shown that the accused had been living in a state of fornication with the daughter of the deceased, but had just married her, and the fact of the marriage had just been communicated to the deceased, who had made threats against the accused if he did not marry her; held, that the accused should be allowed to prove, in rebuttal, that the deceased was in fact opposed to his marriage with the girl, and was himself living in adultery with her, although she was his daughter.—*Walker v. The State*, 105.
 26. *Conduct and declarations of defendant; when admissible against him*.—The conduct and declarations of the defendants on the evening of the homicide, from the time they came to the house where the deceased was living with her son-in-law, until the commission of the crime, are admissible evidence against them, when parts of one continuous transaction,

EVIDENCE.—*Continued.*

although occurring between the defendants and the son-in-law, in the absence of the deceased, and outside the house where she was, and not shown to have any immediate connection with the crime.—*Armor v. The State*, 173.

27. *Evidence of malice or intent.*—Under a prosecution for an assault with intent to murder, any evidence is admissible which tends to show malice, ill-will, or other motive for the act of the accused; and for this purpose, the fact of a former altercation or difficulty between the parties, but not the merits or details thereof, may be given in evidence.—*Gray v. The State*, 66.
28. *Evidence of words defamatory of other women.*—Evidence of words defamatory of other women, though uttered in the same conversation in which the alleged slanderous words against the woman named in the indictment were used, is not relevant, nor admissible against the defendant, in a prosecution under the statute (Code, § 4107).—*Haley v. The State*, 89.
29. *Relevancy of evidence showing use by defendant of goods or chattels obtained by false pretense.*—The use to which the chattels or goods are applied by the defendant, after obtaining them by the alleged false pretense, showing a conversion, or attempted conversion to his own use, is competent evidence against him, as tending to prove an intent to injure or defraud the owner.—*Mack v. The State*, 138.

BURDEN, WEIGHT, AND SUFFICIENCY.

30. *Accomplice.*—When a conviction of felony is sought on the testimony of an accomplice, there must be corroborative evidence tending to connect the defendant with the commission of the crime (Code, § 4894); and when there is such corroborative evidence, it is for the jury to decide the effect to which it is entitled.—*Lockett v. The State*, 5.
31. *Proof of character; weight and effect as evidence.*—In all criminal prosecutions, whether of felony or misdemeanor, the accused may prove his good character, not only when a doubt exists on the other proof, but even to generate a doubt of his guilt; but its value varies according to the proof to which it is opposed, and in connection with which it must be weighed and estimated by the jury; and it does not shield from the consequences of a criminal act, proved to the satisfaction of the jury, though it may raise a reasonable doubt of the act having been done with a criminal intent.—*Armor v. The State*, 173.
32. *Measure of proof, and reasonable doubt.*—As to the measure of proof required in criminal cases, and the reasonable doubt which will justify an acquittal, the correct rule is laid down in the case of *Coleman v. The State*, 59 Ala. 52; and that rule applies to a prosecution for selling liquor to a person of known intemperate habits.—*Tatum v. The State*, 147.
33. *Reasonable doubt; charge requiring explanation.*—Although, in criminal cases, as a general proposition, "it is safer to acquit, in cases of doubt, than to convict;" yet a charge asked, asserting that proposition, is properly refused, because, without explanation, it is calculated to mislead the jury.—*Furrish v. The State*, 164.
34. *Circumstantial evidence.*—A person charged with a felony should not be convicted on circumstantial evidence alone, unless it excludes to a moral certainty every reasonable hypothesis but that of his guilt: no matter how strong the circumstances may be, they do not come up to the full measure of proof which the law requires, if they can be reconciled with the theory that another person was the guilty agent.—*Ex parte Acree*, 234.
35. *Discredited witness; weight of testimony of.*—There is no maxim of the law of evidence which requires greater caution in its application, than that which affirms that a witness, intentionally giving false testimony as to any material fact, is to be wholly discredited by the jury; and this court "follows the authorities which hold that it is not a rule of law, affecting the competency, operating a disqualification of the witness, to be given in charge to the jury as imperatively binding them,

EVIDENCE—*Continued.*

- but is to be applied by them, according to their sound judgment, for the ascertainment, and not for the exclusion of truth."—*Grimes v. The State*, 166.
36. *Insanity; proof of.*—To justify the inference of insanity, such as will justify or excuse a homicide, from the calmness of manner and indifference to results, which sometimes mark the conduct of such persons, there should be convincing evidence of previous insanity, or insane delusions, so recent as, when coupled with the causelessness of the killing, to raise the presumption that the paroxysm had not entirely passed away. On the other hand, calmness, indifference to results, and consciousness of the criminality of the act, with connectedness in the employment of the reasoning faculty, while not conclusive, are strong circumstances tending to prove legal accountability.—*Boswell v. The State*, 307.
37. *Same; burden and measure of proof.*—The law presumes sanity, and that presumption must prevail until it is overcome; and when insanity is set up as a defense in a criminal case, whether the evidence of it arises out of the testimony which proves the commission of the act, or is shown *aliunde*, it is insufficient until it overturns the presumption of sanity (*The State v. Marler*, 2 Ala. 43, and *Briney v. The State*, 5 Ala. 241, commented on, as self-repugnant on this question.)—*Ib.* 307.
38. *Proof of fraud.*—Fraud is never presumed, but must be proved by the party asserting it; and it will not be imputed, when the facts and circumstances, from which it is supposed to arise, may reasonably consist with honest intentions; yet, on the other hand, it is not always required to be established by direct and positive evidence, but, like any other fact, may be proved by circumstances, each inconclusive, but all together leading to a well-grounded, rational belief of its existence. *Thames & Co. v. Rembert's Adm'r*, 561.
39. *Negotiable paper; burden of proof.*—The doctrine has been long settled in this court, as to negotiable paper, that when fraud or illegality in putting it in circulation is shown, or any defense addressed to its consideration, the *onus* is cast on the holder to prove that he acquired it in good faith, before maturity, upon a valuable consideration, and in the usual course of business.—*Mayor of Wetumpka v. Wetumpka Wharf Co.*, 611.

JUDICIAL KNOWLEDGE.

40. *Charter of municipal corporation.*—The charter of a municipal corporation, and special statutes conferring on it additional powers for special purposes, are public statutes, of which the courts will take judicial notice; and all persons dealing with the corporation must, at their peril, take notice of the capacity to contract, its limitations and restrictions, thereby conferred on the corporation.—*Mayor of Wetumpka v. Wetumpka Wharf Co.*, 611.
41. *Judicial acts of notary public, as justice of the peace.*—To give validity to the official acts of a notary public as a justice of the peace, when he has the power of a justice of the peace, it is not necessary, though it would be proper, that he should add to his signature the words "*ex officio* justice of the peace," or other equivalent words. The courts and citizens of the State are presumed and bound to know who its commissioned officers are, and the extent of their authority.—*Coleman v. The State*, 93.
42. *Value of United States treasury-notes.*—The commercial value of United States treasury-notes, commonly called "greenbacks," is, as matter of law, what their face imports; consequently, under an indictment for the larceny of such a note, a conviction may be had without any proof of its value except what it purports on its face to be.—*Duwall & Pelham v. The State*, 12.

EVIDENCE—*Continued.*

OBJECTIONS.

43. *Deposition; when motion to suppress may or must be made.*—A motion to suppress a deposition, or a portion thereof, for defects or causes which may be remedied on a re-examination of the witness, must be made before the trial is begun; but illegal evidence may be suppressed and excluded at any stage of the cause, when it does not appear that it could be rendered legal on a re-examination of the witness.—*M. & C. Railroad Co. v. Maples*, 601.
44. *General question, calling for legal and illegal evidence.*—Error can not be predicated of the refusal to allow a question to be answered, unless it affirmatively appears that the answer would be legal evidence: if the question is general in its terms, calling for evidence which may be legal or illegal, it may be disallowed without error.—*Stewart v. The State* 199.
45. *General objection to evidence.*—A general objection and motion to exclude a mass of evidence, some of which is legal and admissible, may be overruled entirely.—*Shorter v. The State*, 129.
46. *Exception to exclusion of evidence.*—An exception to the exclusion of evidence can not be sustained, when the nature or substance of the excluded evidence is not so set out as to show error on the part of the court, or prejudice to the party excepting.—*Bynum v. So. Pipe and Pump Co.*, 462.
47. *Exception to evidence; certainty requisite in.*—Where the bill of exceptions sets out evidence, some of which is inadmissible, in one continuous sentence, and then adds, "The State objected to this testimony as it was offered, and the court sustained each objection, and the defendant separately excepted;" the exception is wanting in the requisite definiteness and certainty.—*Boswell v. The State*, 307.

OPINION; LEGAL CONCLUSION.

48. *Opinion of witness; when not admissible.*—In an action of trespass, to recover damages for injuries caused by the erection of a mill-dam, whereby a stream was diverted from its natural channel, and overflowed plaintiff's land, a witness can not be allowed to state that, *in his opinion*, plaintiff's land was not injured by the diversion and overflow.—*Hames v. Brownlee*, 277.
49. *To what plaintiff, as witness, may testify.*—The plaintiff, testifying as a witness to her personal injuries, may state, "In consequence of loss of time, and physical disability from the injuries, she had been prevented from earning money by her labor, and had been injured fifty dollars within the four months next after the fall, in consequence of the hurts caused by the fall." This, in substance, is an assertion that her labor during that time would have been worth fifty dollars.—*S. & N. Railroad Co. v. McLendon*, 266.
50. *To what witness may testify.*—The following expressions, used by a witness testifying as to the personal injuries received by the plaintiff, "though awkwardly expressed sometimes, are, at most, conclusions of fact," and are not improperly allowed: "Plaintiff seemed to be suffering" the day after the injury; "she was not able to return home" on that day; "was not able to use her arm a large part of the time for several months;" "when she returned home," on the second day after the injury, "she looked bad, and her left wrist looked like the bone had slipped off the joint;" "she was disabled by the fall, &c.—*Ib.* 266.
51. *Same.*—In a prosecution for murder, whether the defendant, at the time of the homicide, was so drunk as to be incapable of forming a design or intent, is a conclusion to be drawn by the jury from all the evidence before them, and not a question of fact to which a witness may testify.—*Armor v. The State*, 173.
52. *Same.*—Intemperate habits is a collective fact, to which a witness may testify, if he has sufficient knowledge; and the person to whom the liquor was sold may himself testify whether he is or is not of intemperate habits.—*Tatum v. The State*, 147.

EVIDENCE—Continued.

53. *Same*.—A person, knowing the fact, may testify that the intemperate habits of the person to whom the liquor was sold were generally known in the neighborhood in which the sale was made.—*Ib.* 147.
54. *Meaning and explanation of words used*.—In a criminal prosecution for slander of a female (Code, § 4107), when the words used are unambiguous, and of ordinary acceptation and signification, the court and jury must construe them; but, when some cant phrase, or low expression, not having an ordinary acceptation, is used, a witness may testify as to its meaning.—*Haley v. The State*, 89.

PAROL AND WRITTEN.

55. *Parol evidence; when not admissible to vary writing*.—A writing which is complete in itself, and which was executed with deliberation, is the sole memorial of the contract between the parties, and all prior negotiations are presumed to have been merged in it; and in the absence of fraud, or mistake, its terms can not be varied by parol evidence.—*Couch v. Woodruff*, 466.
56. *Same; when admissible to show meaning of words in mortgage, or identify things conveyed*.—When a mortgage conveys "the following described real estate, with the buildings thereon known as the drug-store, and all the fixtures and furniture thereto pertaining, or in any wise belonging;" and it is shown to have been given, on the dissolution of a partnership between the mortgagor and mortgagee in carrying on a drug-store, to secure the payment of the agreed price for the mortgagee's interest in the property and business; the word *furniture* being interlined before signature, on objection by the mortgagee to the use of the word *fixtures* alone; although oral evidence is not admissible to show what the parties agreed should be included in the word *furniture*, it should be received to identify the articles which did in fact constitute the furniture of the building, and were used by the parties in carrying on their said business therein.—*Fore v. Hibbard*, 410.
57. *Same; as to terms outside of written contract; subsequent modification of contract*.—Where the purchaser of a mule, having executed and delivered his note for the price, and having received the mule, "immediately after the execution of his note, and as he was about to leave with the mule, verbally agreed" with the seller that the latter "should have a mortgage on the mule to secure payment of the note;" held, that this agreement, being outside of the contract shown by the note, might be proved by parol, and was also valid as a subsequent modification of that contract.—*Glover v. McGilvray*, 508.
58. *Bond with blank penalty; admissibility of parol evidence*.—An action can not be maintained on an attachment bond, the penalty of which is left blank; nor can the defect be remedied by parol evidence as to what sum should have been specified.—*Copeland & Brantley v. Cunningham*, 394.
59. *Description of lands in conveyance; parol evidence in aid of*.—In a conveyance of lands, if the description of the premises is so inaccurate, vague, and indefinite, that their identity is wholly uncertain, the deed is void, and parol evidence can not be received to cure the deficiency; but, before pronouncing the deed void on its face, the court should receive parol evidence of the circumstances surrounding the parties at the time, having relation to the subject-matter of the deed, and interpret the words of the deed in the light of those circumstances, if thereby the indefiniteness and uncertainty may be removed.—*Clements v. Pearce*, 284.

PRIMARY AND SECONDARY.

60. *Proof of account*.—An account is not documentary evidence, nor governed by the rules which apply to primary and secondary evidence.—*M. & C. Railroad Co. v. Maples*, 601.
61. *Evidence of list of hands for road duty*.—The list of hands for road duty,

EVIDENCE—Continued.

- presented by the apportioners to the overseer, would not, if produced, be evidence of the defendant's liability to road duty, nor of any other material fact in the prosecution against him for failing to work the road; consequently, the fact that his name was on the list may be proved by oral evidence.—*Brown v. The State*, 97.
62. *Proof of probate records; predicate for secondary evidence.*—Proof of the destruction of the court-house by fire, with the records and papers therein deposited and required by law to be kept, authorizes the admission of secondary evidence of the contents of such documents, in the absence of proof that they can be found elsewhere.—*Watson v. The State*, 19.
63. *Proof of judicial proceedings before justice of the peace.*—The proceedings had before a justice of the peace, in an action of unlawful detainer, or forcible entry and detainer, and the judgment rendered by him, can not be proved otherwise than by the production of his official papers, or an examined and sworn copy thereof, without accounting for the absence of the original, or showing the impossibility of obtaining a copy thereof.—*Ib.* 19.
64. *Same; predicate for secondary evidence.*—Proof of the fact that the justice's docket was in the court-house, six or eight months before that building was destroyed by fire, does not justify the inference that it remained there and was destroyed, nor authorize the admission of secondary evidence of its contents, when it is not shown that any inquiry for it has been made of the justice's successor, who would be its legal custodian.—*Ib.* 19.
65. *Warning against trespass.*—In a criminal prosecution for trespass after warning (Code, § 4419), the warning not to enter, like the notice to quit given by a landlord to his tenant, may be either verbal or written; and when in writing, a copy of it may be used as evidence, without notice to produce the original.—*Ib.* 19.
66. *Declarations of witness out of court; when and how proved.*—The declarations of a witness who has been examined, as to any material matter about which he was not questioned, can not be proved by another witness. The witness himself must be first interrogated as to such declarations.—*Atwell v. The State*, 61.
67. *Statements of party as witness in another suit.*—Statements made by a witness while testifying, relative to a material matter in issue in another suit to which he is a party, as showing his knowledge of the insolvency of another person, may be proved against him in that suit without calling him as a witness.—*Loeb & Bro. v. Peters & Bro.*, 243.

RECORDS AND JUDGMENTS.

68. *Sufficiency of certified transcript.*—A transcript from the records of the Circuit Court, duly certified by the clerk, in his official capacity, to contain a full, true, and complete copy of the record, the minute-entries, the execution docket, and the entries thereon, together with all the papers on file pertaining to the particular case, is admissible as evidence, although it does not show the time and place at which the court was held.—*Clements v. Pearce*, 284.
69. *Variance between judgment and execution.*—In a certified transcript of a judgment and execution thereon, if the judgment is for \$752, and the execution purports to have been issued on a judgment for \$752.68, the variance is immaterial, and furnishes no ground of objection to the transcript as evidence.—*Ib.* 284.
70. *Admissibility of record or judgment as evidence against third person.*—In ejectment by a purchaser at a sale made by an assignee in bankruptcy, to recover lands which the bankrupt claims as his homestead exemption, an order of the bankrupt court, rendered after the commencement of the suit, *nunc pro tunc* (but not stating of what time), on the *ex parte* petition of the bankrupt; which recites that "it appears to the court

EVIDENCE—*Continued.*

that a homestead exemption was regularly set aside and assigned to the said bankrupt, but there is no record evidence to protect his title,' and therefore orders the assignee of his estate to 'execute to said bankrupt a conveyance, *tunc pro tunc*, of the following real estate, as his homestead exemption,"—is not admissible evidence against the plaintiff, when offered without the petition, the action of the court assigning the homestead, or other judicial proceeding had in connection with it. *Furley, Spear & Co. v. Whitehead*, 295.

71. *Proof of judicial proceedings before justice of the peace.*—The proceedings had before a justice of the peace, in an action of unlawful detainer, or forcible entry and detainer, and the judgment rendered by him, can not be proved otherwise than by the production of his official papers, or an examined and sworn copy thereof, without accounting for the absence of the original, or showing the impossibility of obtaining a copy thereof.—*Watson v. The State*, 19.
72. *Time; predicate for secondary evidence.*—Proof of the fact that the justice's docket was in the court-house, six or eight months before that building was destroyed by fire, does not justify the inference that it remained there and was destroyed, nor authorize the admission of secondary evidence of its contents, when it is not shown that any inquiry for it has been made of the justice's successor, who would be its legal custodian.—*Ib.* 19.
73. *Proof of probate records; predicate for secondary evidence.*—Proof of the destruction of the court-house by fire, with the records and papers therein deposited and required by law to be kept, authorizes the admission of secondary evidence of the contents of such documents, in the absence of proof that they can be found elsewhere.—*Ib.* 19.

EXECUTION.

1. *Liability of property to payment of debts.*—In the absence of statutory and constitutional exemptions, property of every kind, and every beneficial interest therein, may be subjected to the payment of the owner's debts; and property subsequently acquired is, under the provisions of the Federal constitution, equally liable with that owned by the debtor when the debt was created.—*Neely v. Henry*, 261.
2. *Execution on judgment against municipal corporation.*—When judgment is rendered against a municipal corporation, execution may be ordered to issue against it, as against a private person; and under such execution, though property used for public purposes can not be seized, such as hospitals, markets, cemeteries, &c., private property belonging to the corporation, and not useful or used for corporate purposes, may be seized and sold.—*Mayor, &c. of Birmingham v. Rumsey & Co.*, 352.
3. *Against partnership.*—When an action is brought against a partnership in its firm name, not naming the individual partners who compose it, and judgment is rendered against it, an execution thereon can only be levied on the partnership property (Code, § 2904); but, when the action is against the partners individually, though they are described as partners composing the firm, execution is properly issued against them individually.—*Haralson v. Campbell*, 278.
4. *Lien.*—The lien of an execution does not vest in the judgment creditor either a *jus ad rem*, or a *jus in re*, and can not prevail against the prior equity acquired by a purchase for valuable consideration without notice before the levy.—*Thames & Co. v. Rembert's Adm'r*, 561.
5. *Return day, under general law, and special statute in Mobile.*—Under the general statutes of the State, the return term of an execution is the term next after its date, except when it is issued less than fifteen days before the commencement of that term (Code, § 3191), and the sheriff is required to make return of the writ three days before the first day of the term; but, under the special statute regulating the practice in the Circuit Court of Mobile, approved February 28th, 1870, which is still of force in this particular, an execution is returnable on the first Monday

EXECUTION—*Continued.*

in the month next after the expiration of five months from the day it is issued.—*Shelton v. Merrill*, 343.

6. *Title of purchaser at sheriff's sale under execution; proof of outstanding title by defendant.*—In ejectment, or the corresponding statutory action, by a purchaser at sheriff's sale under execution on a judgment at law, he must prove that the defendant in execution had such an estate or interest in the lands, at the time of the levy, as was subject to levy and sale; and the defendant in the action, although he was also the defendant in execution, may defeat a recovery by showing that, notwithstanding his possession at the time of the levy and sale, he did not have such an interest as was subject to the execution.—*Clements v. Pearce*, 284.

EXECUTORS AND ADMINISTRATORS.

1. *Grant of administration on creditor's estate, to debtor; presumption of payment.*—When letters testamentary, or of administration, are granted to a debtor of the testator or intestate, the presumption of payment at once arises, and the debt is extinguished by operation of law, without regard to the duration of the administration, or the solvency of the debtor so appointed.—*Miller v. Irby's Adm'r*, 477.
2. *Grant of administration on debtor's estate, to creditor; right of retainer, and extinguishment of debt.*—When letters testamentary, or of administration, on the estate of a deceased debtor, are granted to a creditor, he has a right to retain, out of the assets which may come into his hands, enough to pay his own debt, in preference to all others of equal degree; and if sufficient assets come to his hands, which might be legally applied in payment of such debts, his retainer for his own debt, and its consequent extinguishment, are conclusively presumed: no act on his part is necessary to effect it, nor can any act or laches on his part prevent it.—*Ib.* 477.
3. *Same; extent of right of retainer.*—This right of retainer, with its legal consequences, is not limited to debts due to the personal representative individually, but also includes debts due to him as trustee, or as executor or administrator of another person.—*Ib.* 477.
4. *Same; as affected by statutory provisions.*—The common-law doctrine of retainer, as above stated, is not repealed by statute in this State, unless the insolvency of the estate of the deceased debtor intervenes; but it is modified by the changes affected by statute, as to the title, rights and duties of executors and administrators.—*Ib.* 477.
5. *Rights and powers of executor or administrator over personal assets.*—At common law, an executor, or administrator, was regarded as the absolute owner of all the personal assets, and, as an incident of ownership, had unlimited power to dispose of them; but, under our statutes, while his power to dispose of the *choses* in action is unlimited, he can not dispose of the visible, tangible personal property, except by an order of sale made by the proper Probate Court.—*Ib.* 477.
6. *Same; right of retainer, and extinguishment of debt.*—In consequence of this statutory change in the rights and powers of an executor or administrator over the personal assets, a retainer and extinguishment of his debt will not be presumed from the mere possession of visible, tangible property, until after the lapse of a reasonable time, within which it might, by a sale under an order of the proper court, be converted into money, and applied in payment of debts; but, after the lapse of such reasonable time, the executor or administrator can claim no advantage from his own negligence and laches, and the presumption attaches, although he did not in fact obtain an order of sale.—*Ib.* 477.
7. *Liability of lands for debts; right of retainer, and extinguishment of debt.*—The decedent's lands are charged by statute with the payment of his debts, and may be sold for that purpose, under an order of the Probate Court, granted on the application of the executor or administrator, when the personal assets are insufficient; and the failure to exercise this statutory power, in a proper case, is a breach of duty on his part, from which re-

EXECUTORS AND ADMINISTRATORS—*Continued.*

- sult the same consequences, as to the retainer and presumed extinguishment of his debt, as from his failure to obtain an order for the sale of the personal property.—*Ib.* 477.
8. *Same; when retainer and extinguishment will be presumed.*—The failure of the executor or administrator to exercise these statutory powers, by obtaining orders of sale from the proper court, for such length of time as would render him chargeable at the suit of other creditors, is sufficient to raise the presumption of the extinguishment of his own debt.—*Ib.* 477.
 9. *Giving note by administrator, binding on estate; contents of petition.*—When an executor or administrator desires to procure an order of the Probate Court, authorizing him to give a note which shall be binding on the decedent's estate (Code, § 2432), his petition must aver that he is the personal representative; must describe the debt, and state whether it was contracted by himself or by the decedent; if contracted by him, must allege the consideration, showing that it is within the terms of the statute, and that it was necessary, and that it is a reasonable charge; and must also disclose the names, and residences if known, of the heirs, devisees, distributees, or legatees, who are interested in the property sought to be charged.—*Witburn & Co. v. McCalley*, 436.
 10. *Same; jurisdiction of court, and irregularities in proceedings.*—In a proceeding under this statute, the jurisdiction of the court attaches on the filing of a petition, containing the essential averments above stated; and when the jurisdiction has thus attached, by analogy to proceedings in that court for an order to sell a decedent's lands, subsequent errors and irregularities do not affect the validity of the order, when collaterally assailed.—*Ib.* 436.
 11. *Same; notice to heirs, devisees, &c.*—Notice should be given to the heirs, devisees, or other parties in adverse interest, that they may have an opportunity to controvert the averments of the petition; yet, when the jurisdiction of the court has attached, by the filing of a proper petition, the failure to notify the heirs, &c., is a mere irregularity, and does not affect the validity of the order when collaterally attacked.—*Ib.* 436.
 12. *Same; when order is void, and does not create cloud on title.*—If the petition of the administrator does not contain the averments necessary to give the court jurisdiction, an order founded on it, authorizing the administrator to give his note as prayed, would be *coram non judice*, and void; and a judgment rendered on the note, and a sale under execution thereon, would neither pass title, nor create a cloud on the title.—*Ib.* 436.
 13. *Same; equitable relief to heirs or devisees.*—When an order is granted by the court as prayed, although the petition is substantially defective, the order being void, and a judgment rendered on the note being also void, the heirs or devisees can not maintain a bill in equity to enjoin a sale under it; and if the petition was sufficient, and they had due notice of it, they can not have equitable relief against the judgment, in the absence of fraud in the procurement of the order, or something equivalent to it; but, if the petition was sufficient, and they in fact had no notice of the proceeding, a court of equity will, at their instance, perpetually enjoin a sale of the property of the estate under a judgment on the note given by the administrator, on averment and proof that the debt for which the note was given was not, within the terms of the statute, a proper charge against the estate.—*Ib.* 436.

See, also, ESTATES OF DECEDENTS.

EXEMPTIONS.

1. *Exemptions for benefit of decedent's family; governed by what law.*—Exemptions for the benefit of a decedent's surviving widow or family are governed by the law which was of force at the time of his death.—*Davis v. Davis*, 293.
2. *Same; title of widow.*—The act approved April 23, 1873 (Sess. Acts 1872-3, pp. 64-69), by its 6th section, exempted from liability to debts or admin-

EXEMPTIONS—*Continued.*

- istration, for the benefit of the decedent's widow, or minor child or children, besides other things, personal property which was supposed to be necessary for present subsistence, use, and consumption, and books, family portraits, &c., which had an especial value to the family; and as to these articles the right of exemption is not dependent on the solvency or insolvency of the estate, nor did any title to them pass to the personal representative.—*Ib.* 293.
3. *Same; same.*—The act "to regulate property exempt from sale for the payment of debts," approved April 23, 1873 (Sess. Acts 1872-3, p. 64), exempted from liability for the debts of the deceased husband, in favor of his surviving widow, "personal property to the value of one thousand dollars" belonging to his estate; and this right accrued to the widow on the death of the husband, although she only survived him a few days. But the statute did not vest in her the title to any specific property, as so exempt: until a selection was made by her, the personal representative, or commissioners appointed by the judge of probate, she had no title to any specific property, for which she could maintain trover against the husband's administrator; nor could her personal representative maintain such action.—*Tucker v. Henderson's Adm'r*, 280.
 4. *Homestead exemption of bankrupt.*—Since the title to the exempt property of a bankrupt does not vest in his assignee (Rev. Stat. U. S. § 5045), it would seem that he is not entitled to a conveyance of his homestead by the assignee.—*Farley, Spear & Co. v. Whitehead*, 295.
 5. *Homestead exemption under constitution; where lands are worth more than \$2,000.*—The constitution of 1868, like the present constitution, without the aid of statutory provisions, exempted a homestead not exceeding \$2,000 in value; but, if the homestead, when reduced to its lowest practicable area, exceeded that value, no part of it was exempted, and the whole might be aliened by the husband by any ordinary mortgage or other conveyance.—*Ib.* 295.
 6. *Homestead exemption; allowance by District Court in bankruptcy, in lands subject to attachment lien.*—The allowance of a homestead exemption by the District Court in bankruptcy, in lands which, though included in the bankrupt's schedule, were subject to the lien of an attachment levied on them more than four months prior to the adjudication in bankruptcy, and which were afterwards sold under the judgment in the attachment suit, operates only on such claim and interest in the land as passed to the assignee, and can not prevail against a purchaser under the judgment in attachment.—*Martin v. Lile*, 406.
 7. *Same; how waived, or lost.*—When an attachment is levied on lands, the right to a homestead exemption in them must be claimed and asserted before the lands are sold under final process on the judgment in the attachment suit, or it is waived and lost.—*Ib.* 406.
 8. *Occupancy.*—A homestead exemption can not be claimed in lands which are not in the actual occupancy of the debtor as a residence.—*Ib.* 406.
 9. *Same.*—Under the constitutional and statutory provisions which were of force in 1873-4, actual occupancy was necessary to support a claim of homestead exemption: if the owner removed from the premises, though under the advice of a physician, and with the declared intention of returning, and rented them out by the year, the exemption was forfeited and lost.—*Stowe v. Lillie*, 257.
 10. *Same.*—Not only title, but actual occupancy also, as distinguished from constructive possession, is essential to the right of homestead: there must be an occupancy in fact, or a clearly defined intention of present residence and occupancy, delayed only by the time necessary to effect removal, or to complete needed repairs, or a dwelling-house in process of erection; and this intention must be shown by acts of preparation of a visible character, or by something equivalent thereto, before the lien of the creditor's execution has attached.—*Blum v. Carter*, 235.
 11. *Affidavit of exemption.*—An affidavit, in support of a claim of homestead exemption, must show that the premises were occupied as a homestead, or that there was a manifested intention and preparation to occupy,

EXEMPTIONS—*Continued.*

- when the lien of the execution attached; and when the homestead is part of a larger tract of land, the particular portion claimed must be designated.—*Ib.* 235.
12. *Homestead exemption; governed by what law.*—The extent and quantity of the homestead, which is exempt as against execution creditors, are governed by the law which was in force at the time the debt was contracted against which the right is claimed, and not by that which may be in force when the right is asserted.—*Ib.* 235.
 13. *Same in 1870.*—The extent and quantity of the homestead in 1870 was determined only by the provisions of the constitution of 1868, which fixed the quantity, in lands in the country, at eighty acres.—*Ib.* 235.
 14. *Same, by tenant in common.*—A tenant in common may claim a homestead in lands owned and occupied by himself and others, but the area of the homestead is not enlarged on account of his partial interest in it: if he would only be entitled to claim eighty acres in lands owned entirely by him, he can only claim a homestead in that quantity of lands held and owned by him in common with others.—*Ib.* 235.
 15. *Waiver of exemption.*—A waiver of exemption, when intended to apply only to a part of the property exempted, must specify the part to which it is intended to apply; but, when the waiver is of all exemptions, or all claim of exemption, no specification of the property is necessary.—*Neely v. Henry*, 261.
 16. *Same.*—A waiver of all exemptions, or of all claim of exemption, by a married man, though not valid as to the homestead without the signature of the wife (Code, § 2847), will be held valid and operative as to the exemptions of personal property, *ut res magis valeat quam pereat*.—*Ib.* 261.
 17. *Same.*—A waiver of all exemptions, incorporated in a promissory note as a part of its consideration, when not expressly limited to property then owned by the debtor, applies equally to property afterwards acquired by him.—*Ib.* 261.

FALSE PRETENSES. See CRIMINAL LAW, 64-66.

FRAUD.

1. *Proof of.*—Fraud is never presumed, but must be proved by the party asserting it; and it will not be imputed, when the facts and circumstances, from which it is supposed to arise, may reasonably consist with honest intentions; yet, on the other hand, it is not always required to be established by direct and positive evidence, but, like any other fact, may be proved by circumstances, each inconclusive, but all together leading to a well-grounded, rational belief of its existence. *Thames & Co. v. Rembert's Adm'r*, 561.

FRAUDULENT CONVEYANCES.

1. *Conveyance by insolvent debtor to relative held fraudulent as to creditors.*—A conveyance, in form a deed of bargain and sale, reciting the payment of a valuable consideration, partly in cash, and the grantee's personal obligations, without security, for the residue payable in cotton, held fraudulent and void as against the grantor's creditors, notwithstanding the positive denials of both the grantor and grantee under oath as witnesses, on proof that, at the time of its execution, the grantor was insolvent, and pressed by a suit for a large amount, which ripened into judgment in a few months; that the deed conveyed all his visible property, except that which was exempt from legal process, and that which was incumbered to its full value; that the grantee was a young man, not twenty-one years of age, with small pecuniary means, a relative of the grantor, and about to consummate a marriage with his daughter; that payment of the greater part of the purchase-money was, by the terms of the deed, to be made by annual installments through a series

FRAUDULENT CONVEYANCES—*Continued.*

of six years; that the grantor remained in possession of the property; that a part of the lands were, within a short time afterwards, conveyed by the grantee to the grantor's wife, on a recited consideration which was fictitious; and that the parties united in raising money for their common benefit, by mortgages on the land, and pledges of the notes or obligations given for the unpaid purchase-money.—*Thames & Co. v. Rembert's Adm'r*, 561.

2. *Title of purchaser from fraudulent grantee.*—A purchaser from a fraudulent grantee may, as against the creditors of the grantor, set up the defense of a *bona fide* purchase for valuable consideration without notice, when the deed is not fraudulent and void on its face.—*Id.* 561.

GAMING. See CRIMINAL LAW, 67.

GARNISHMENT. See ATTACHMENT, 13.

HABEAS CORPUS. See CRIMINAL LAW, 68-69.

HOMESTEAD. See EXEMPTIONS.

HUSBAND AND WIFE.

1. *Statutory separate estate of wife; how subjected to debts.*—The statutes creating the wife's statutory separate estate have clearly defined the debts to which it may be subjected, and the remedy by which the liability for those debts may be enforced (Code, §§ 2711-12); consequently, a mortgage given by husband and wife, to secure the payment of such a debt, can not be enforced in equity against her separate property thereby conveyed.—*Gilbert v. Dupree's Adm'r*, 331.
2. *Sufficiency of verdict.*—In an action against husband and wife, seeking to charge the wife's property, particularly described, and alleged to belong to her statutory separate estate, with the price of necessary family supplies sold and delivered (Code, § 2711), a verdict finding the issue in favor of the plaintiffs, assessing their damages at a specified sum, and further finding "the following *separate estate* to belong to" the wife, is sufficient to support a judgment for plaintiffs, although it does not, in words, find that the property belongs to the *statutory* separate estate of the wife.—*Nelms v. Armstrong*, 330.
3. *Mortgage of wife's lands.*—A mortgage by husband and wife, of lands belonging to the wife's statutory separate estate, whether given to secure her own debt, or the debt of her husband or any other person, is an absolute nullity, and no rights can be acquired under it.—*Thames & Co. v. Rembert's Adm'r*, 561.
4. *Wife's separate estate, statutory and equitable; how charged.*—There is an essential difference in the manner of charging the statutory separate estate of a married woman and her equitable separate estate, or separate estate by contract: the former is charged by the statute (Code, § 2711) with the price of certain articles, the character of which is specified, and her agency in purchasing them is immaterial; while the latter can only be charged by the act and agreement of the wife, and, in the absence of restraining words in the instrument creating the estate, may be charged to the same extent as if she were a *feme sole*.—*Wilburn & Co. v. McCalley*, 436.
5. *Wife's statutory separate estate under deed.*—Under a deed executed in 1846, by which the grantor, declaring his desire to make "a sure and permanent provision" for his wife, conveys lands and slaves to a trustee, "his heirs and assigns," in trust for the sole use and benefit of the wife during the term of her natural life; and, at the termination of said estate, "then the said lands and premises, and the said slaves and their future increase, to be held in trust by the said L." [trustee] "for the sole use and benefit of" her children by the grantor; the estate of the trustee terminates on the death of the wife, and the legal title then passes to

HUSBAND AND WIFE—*Continued.*

- the children who are remainder-men; and on the subsequent marriage of one of the daughters, her interest in the property is held by her as a part of her statutory separate estate.—*Bercy v. Lavretta*, 374.
6. *Widow's interest in goods of deceased husband's estate, before administration granted.*—The widow has such an interest in the personal chattels belonging to the estate of her deceased husband, before letters of administration have been granted on the estate, that a conviction may be had under the statute against any one who, by any false pretense, obtains possession of them from a bailee, with intent to injure or defraud her.—*Mack v. The State*, 138.

INDICTMENT. See CRIMINAL LAW, 70-90.

INSANITY. See CRIMINAL LAW, 44-48.

JUDGMENTS.

1. *Assignment of judgment.*—The assignee of a judgment succeeds only to the rights of his assignor, and can not claim protection against equities which were binding on his assignor.—*Mayor &c. of Wetumpka v. Wetumpka Wharf Co.*, 611.
2. *Conclusiveness of judgment.*—A judgment against a municipal corporation, on a bond issued under authority conferred by a special statute, is conclusive on the corporation, as to the validity of the bond, and as to all defenses which might have been urged against it at law; but, when the owner of the judgment files a bill in equity against the corporation, to enforce a statutory trust, by which the property and revenues of the corporation were pledged and appropriated to the payment of the bonds to be issued under the authority of the statute, the corporation is not precluded by the judgment from showing that the bond was in fact issued in violation of the conditions, limitations, and restrictions imposed by the statute.—*Id.* 611.
3. *Same.*—A judgment against the mortgagor, rendered prior to the execution of the mortgage, binds the mortgagee as a privy, and is conclusive as to all defenses which might have been urged against the claim on which it is founded.—*Cook v. Parham & Blunt*, 456.
4. *Same.*—The judgment rendered on the trial of a contested election, before a court or magistrate clothed with statutory jurisdiction of such proceeding, is conclusive in a subsequent action of *quo warranto*, as to the right to the office, in favor of the party to whom it is awarded.—*Davidson v. Woodruff*, 432.
5. As to the amendment of judgments on error, see AMENDMENT, 3, 4.

JURISDICTION.

1. *Jurisdiction defined.*—Jurisdiction is the power to hear and determine a cause, and it exists whenever an officer or tribunal is by law clothed with the capacity to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power.—*Woodruff v. Stewart*, 206.
2. *Mayor's jurisdiction under municipal ordinance.*—When a person is brought before the mayor of a municipal corporation, charged with a violation of a by-law or ordinance of the corporation, the existence of a by-law or ordinance, established and promulgated by the proper authority prior to the commencement of the prosecution, is an essential element of his jurisdiction; but the reasonableness of the by-law or ordinance, while affecting its validity, is a question for his decision, and not a question affecting his jurisdiction in the particular case.—*Id.* 206.
3. As to the criminal jurisdiction of the Circuit Court at a special term, see *Bales v. The State*, 30.
4. As to the jurisdiction of the Probate Court, in the matter of authorizing

JURISDICTION—Continued.

an administrator to give a note binding the decedent's estate, see *Wilburn & Co. v. McCalley*, 436.

5. As to the criminal jurisdiction of a justice of the peace in Jackson county, see *Ex parte Brown*, 187.

JURORS AND JURY. See CRIMINAL LAW, 91-108.

JUSTICE OF THE PEACE.

1. *Judicial acts of notary public, as justice of the peace.*—To give validity to the official acts of a notary public as a justice of the peace, when he has the power of a justice of the peace, it is not necessary, though it would be proper, that he should add to his signature the words "*ex officio* justice of the peace," or other equivalent words. The courts and citizens of the State are presumed and bound to know who its commissioned officers are, and the extent of their authority.—*Coleman v. The State*, 93.
2. *Appeal from justice; when barred.*—In a criminal case tried before a justice of the peace, in a matter within his jurisdiction, the defendant has a right of appeal, under the rules and regulations prescribed for the trial of appeals from the County Court (Code, §4701); and no time being prescribed within which the appeal must be taken, the right is only lost by the lapse of time which would bar an appeal to this court. *Dean v. The State*, 153.
3. *Certiorari; when allowed.*—In this State, a party has the right by statute to sue out a *certiorari*, to remove a judgment rendered against him by a justice of the peace, into the Circuit or City Court, when the right of appeal has been lost, without fault on his part, by lapse of time; and the cause is tried *de novo* in that court, without regard to the regularity of the proceedings before the justice, or the sufficiency of the petition for the *certiorari*. But the statute applies only to civil causes, and there is no statute which gives a *certiorari* in a criminal case, to remove a judgment rendered by a justice of the peace.—*Ib.* 153.
4. *Prosecution before justice; sufficiency of complaint and warrant.*—In a criminal prosecution before a justice of the peace, technical accuracy in the description of the offense, either in the complaint or in the warrant, is not required: it is sufficient under the statute (Code, §§ 4647, 4651-2), as it would be without any statute, if the offense is designated by name only, or described by words from which it may be inferred.—*Brown v. The State*, 97.
5. *Criminal jurisdiction of justice in Jackson county.*—The General Assembly, in the exercise of its constitutional powers, having conferred upon justices of the peace in Jackson county, and in certain other counties specially named, "original jurisdiction, concurrent with the Circuit Court, of all misdemeanors committed in said counties respectively" (Sess. Acts 1876-7, p. 197), this grant of jurisdiction carries with it, by implication, every thing necessary to render it effectual; and in the exercise of this jurisdiction, a justice of the peace may render the same judgment that might be rendered by the Circuit Court, and, on conviction of the defendant, may impose the same sentence and punishment that might be imposed by either the court or the jury.—*Ex parte Brown*, 187.
6. *Proof of judicial proceedings before justice of the peace.*—The proceedings had before a justice of the peace, in an action of unlawful detainer, or forcible entry and detainer, and the judgment rendered by him, can not be proved otherwise than by the production of his official papers, or an examined and sworn copy thereof, without accounting for the absence of the original, or showing the impossibility of obtaining a copy thereof.—*Watson v. The State*, 19.
7. *Same; predicate for secondary evidence.*—Proof of the fact that the justice's docket was in the court-house, six or eight months before that building was destroyed by fire, does not justify the inference that it remained

JUSTICE OF THE PEACE—*Continued.*

there and was destroyed, nor authorize the admission of secondary evidence of its contents, when it is not shown that any inquiry for it has been made of the justice's successor, who would be its legal custodian.—*Id.* 19.

LARCENY. See CRIMINAL LAW, 119-124.

LEGACY AND DEVISE.

1. *When remainder is vested.*—Under a devise of lands to a married woman for life, "and after her death to her children then living," the children take a vested remainder, as distinguished from one that is contingent.—*Kumpe v. Coons*, 448.

LETTER OF CREDIT. See ACTION, 7.

LIMITATIONS, STATUTE OF.

1. *To amended complaint.*—Where the original complaint is founded on the sheriff's official bond, and assigns as a breach the non-payment of a decree rendered against him as administrator by virtue of his office; and an additional count is filed, by leave of the court, as an amendment to the complaint, which counts on the probate decree only, and makes no reference to the bond; the amendment does not present new matter, to which the statute of limitations can be pleaded.—*Stringer v. Waters*, 361.
2. *Limitation of prosecution; when statute is suspended.*—When an indictment is quashed, on account of a defect in the organization of the grand jury, and another indictment is preferred, "the time which elapsed between the finding of the first and the subsequent indictment must be deducted from the time limited by law for the prosecution of the offense" (Code, § 4820). The expressions used in the case of *Finley v. The State* (61 Ala. 201), as to the utter invalidity of an indictment found by a body of men not legally organized as a grand jury, are not to be construed as meaning that such an indictment would not suspend the running of the statute of limitations as above provided.—*Weston v. The State*, 155.
3. *Limitation to bill impeaching decree for fraud.*—A bill to impeach a decree for fraud, though not within the terms of the statute which bars a bill of review after the lapse of three years (Code, § 3843), must, by analogy, be governed by the same limitation.—*Gordon's Adm'r v. Ross*, 364.
4. *Suspension of statute in case of death.*—Under the present statute of limitations (Rev. Code, § 2918; Code of 1876, § 3244), without regard to the accrual of the cause of action, or the time of granting administration, the running of the statute can not be suspended for a longer period than six months from the death of a testator or intestate.—*Pickett v. Hobdy*, 609.
5. *When available on demurrer.*—When a bill in chancery shows on its face that the relief prayed for is barred by the statute of limitations, the defense is available by demurrer.—*Bercy v. Larretta*, 374.
6. *Same; averment of infancy.*—An averment in a bill in chancery, that the complainants' mother "was an infant under the age of twenty-one years" on a specified day, which was twelve years before the filing of the bill, being construed most strongly against the pleader, is not equivalent to an averment that she was an infant at a later day; and being thus construed, the bill shows on its face that the asserted claim is barred by the statute of limitations of ten years.—*Id.* 374.
7. *Exception when judgment is arrested or reversed; dismissal of bill without prejudice.*—When the chancellor dismisses a bill generally, and his decree is so modified by this court, on appeal, as to order the dismissal without prejudice to the right of one of the complainants to sue again; a bill filed by the heirs of said complainant, within twelve months after

LIMITATIONS, STATUTE OF—*Continued.*

such dismissal, is not within the statute (Code, § 3235) which allows a new action to be commenced within one year after the arrest or reversal of a judgment for the plaintiff, although the period prescribed as a bar has been completed since the commencement of the first action.—*Ib.* 374.

MANDAMUS. See ATTACHMENT, 8.

MECHANICS' LIEN.

1. *Statutory lien of contractors, mechanics, and material-men.*—The lien given by statute to contractors, mechanics, and material-men, for labor done and materials furnished in the construction of buildings, &c. (Code, §§ 3440-44), attaches from the commencement of the building, but is inchoate until the claim is filed in the office of the judge of probate; and if the claim is not so filed within the time prescribed by the statute, the lien is lost.—*Welch v. Porter & Co.*, 225.
2. *Same.*—When a contractor undertakes to do the work on a building, or to furnish the materials and do the work, he acquires a lien under the statute, to the extent of his contract, from the commencement of the work; and when one person contracts to do the work, and another contracts to furnish the materials, the lien of each attaches when he begins the performance of his contract. But, when a contractor undertakes only to do the work, and the materials are to be furnished by the owner of the property, and after the commencement of the work materials are furnished by a third person, under a separate and independent contract with the owner, the lien of the material-man does not relate back to the commencement of the building, so as to override the lien of a mortgage or other intervening incumbrance.—*Ib.* 225.
3. *Statutory lien of material-man.*—Under the statute giving a lien to mechanics, employees, and material-men (Code, §§ 3440-3461), a lumber merchant furnishing materials for any building, erection, or improvement on land, has a lien on such building, &c., and on the land on which it is situated, whether such materials are furnished to the mechanic who has contracted to do the work, or directly to the owner or proprietor under a contract made with him personally.—*Geiger & Co. v. Hussey*, 338.

MORTGAGE.

1. *Parol mortgage.*—As between the parties, a valid mortgage of a chattel may be created by parol, and no particular form of words is necessary: a verbal agreement between the seller and the purchaser of a mule, that the former shall have a mortgage on the mule, if the note for the purchase-money is not paid at maturity, is a valid parol mortgage.—*Glover v. McGibray*, 508.
2. *Mortgage of wife's lands.*—A mortgage by husband and wife, of lands belonging to the wife's statutory separate estate, whether given to secure her own debt, or the debt of her husband or any other person, is an absolute nullity, and no rights can be acquired under it.—*Thames & Co. v. Rembert's Adm'r*, 562.
3. *Same.*—The statutes creating the wife's statutory separate estate have clearly defined the debts to which it may be subjected, and the remedy by which the liability for those debts may be enforced (Code, §§ 2711-12); consequently, a mortgage given by husband and wife, to secure the payment of such a debt, can not be enforced in equity against her separate property thereby conveyed.—*Gilbert v. Dupree's Adm'r*, 331.
4. *Parol evidence; when admissible to show meaning of words in mortgage, or identify things conveyed.*—When a mortgage conveys "the following-described real estate, with the buildings thereon known as the drug store, and all the fixtures and furniture thereto pertaining, or in any

MORTGAGE—*Continued.*

wise belonging;" and it is shown to have been given, on the dissolution of a partnership between the mortgagor and mortgagee in carrying on a drug-store, to secure the payment of the agreed price for the mortgagee's interest in the property and business; the word *furniture* being interlined before signature, on objection by the mortgagee to the use of the word *fixtures* alone; although oral evidence is not admissible to show what the parties agreed should be included in the word *furniture*, it should be received to identify the articles which did in fact constitute the furniture of the building, and were used by the parties in carrying on their said business therein.—*Fore v. Hibbard*, 410.

5. *When equity will enjoin sale under power in mortgage.*—A court of equity will enjoin the execution of a power of sale in a mortgage, at the instance of a purchaser of the property, who bought subject to the mortgage, when it clearly appears that the power is perverted from its legitimate purpose, to oppress the purchaser, or to aid others in obtaining an unconscionable advantage over him; as where the mortgagee colludes with third persons, who are attempting to subject the lands to an alleged outstanding vendor's lien, to prevent the purchaser from successfully defending that suit, the litigation casting a cloud on his title, and preventing him from raising money on the property to pay off the mortgage debt, and thereby force him into a settlement or compromise of the asserted vendor's lien,—the sale will be enjoined until the termination of the vendor's suit.—*Struve v. Childs*, 473.
6. *Presumption of satisfaction of mortgage.*—A mortgage will not be presumed to be satisfied, merely from the lapse of twenty years before filing a bill to foreclose it, when partial payments were made on the debt, before the lapse of twenty years.—*Cook v. Parham & Blunt*, 456.
7. *Rents and profits; when not charged against mortgagor's widow.*—When the mortgagor dies in possession of the mortgaged premises, his widow is entitled to remain in possession, taking the rents and profits, until her dower is assigned, or until the mortgage is foreclosed; and she will not be charged with rents and profits, as a mortgagee in possession, at the suit of another mortgagee, because she took an assignment of the mortgage after her husband's death.—*Ib.* 456.
8. *Assignment of debt and mortgage by heirs (or devisees) of mortgagee.*—A conveyance of the mortgaged premises, by the heirs (or devisees) of the deceased mortgagee, to the wife of the mortgagor, operates in equity as an assignment of the secured debt; and their assignment of the secured debt to her, whether they have the legal title or not, passes an equity against all the world, except creditors whose rights are affected; a stranger can not be heard to question the validity and effect of such assignment.—*Ib.* 456.
9. *When mortgagee is purchaser for valuable consideration.*—When a mortgage is taken merely as security for a pre-existing debt, without an extension of the day of payment, or any new consideration, the mortgagee is not regarded as a purchaser for valuable consideration, nor entitled to protection against prior equities of which he had no notice; *secus*, when the consideration is a debt contemporaneously contracted, or the extension of a pre-existing debt.—*Thurman v. Stoddard & Co.* 336; *Cook v. Parham & Blunt*, 456; *Thames & Co. v. Rembert's Adm'r*, 562.
10. *How affected by discharge of debt.*—A mortgage is but an incident of the debt which it was given to secure, and is extinguished when the debt is paid or discharged; but, where a principal and his surety join in a mortgage of lands, which the surety has sold to his principal, executing to him a bond for titles on payment of the purchase-money, and the debt is discharged, as to the surety, by the laches or conduct of the creditor, although the mortgage is extinguished as to the surety, it remains a valid security on the principal's equitable interest in the lands. *White's Adm'r v. Life Association*, 419.
11. As to what is a sufficient description of the mortgaged lands, in a bill to foreclose, see *Hurt v. Blount*, 327; *Hurt v. Freeman*, 335. (CHANCERY, 24, 25.)

NEGLIGENCE. See RAILROADS, 2.

OVERRULED CASES; CASES DOUBTED, EXPLAINED, &C.

1. *Brinyea v. The State*, 5 Ala. 241, declared inconsistent and self-repugnant on the question of the burden of proof, when insanity is set up as a defense in a criminal case, in *Boswell v. The State*, 307.
2. *Burton v. Smith*, 49 Ala. 293, as to the recovery of attorney's fees as damages in an action on an attachment bond, overruled by *Copeland & Brantley v. Cunningham*, 394.
3. *Finley v. The State*, 61 Ala. 201, as to the invalidity of an indictment found by a grand jury illegally organized, explained and limited by *Cross v. The State*, 40; *Weston v. The State*, 155.
4. *Marler v. The State*, 2 Ala. 43, as to the burden of proof on the question of insanity in a criminal case, declared inconsistent and self-repugnant, in *Boswell v. The State*, 307.
5. *McClellan v. Lipscomb*, as to the lien of an attachment on lands, and the remedy to enforce it, explained in *Phillips v. Ash's Heirs*, 414.
6. *Smoot v. Hart*, 33 Ala. 69, as to garnishment of debt due to municipal corporation, overruled by *Underhill v. Calhoun*, 216.

PARTNERSHIP.

1. *Partnership debts; liability of partners personally.*—Partnership debts are also the debts of each partner personally; and when they are evidenced by promise in writing (Code, § 2905), an action on them may be maintained against the partners either jointly or severally.—*Haralson v. Campbell*, 278.
2. *Action against partnership, or partners individually; form of judgment and execution.*—When an action is brought against a partnership in its firm name, not naming the individual partners who compose it, and judgment is rendered against it, an execution thereon can only be levied on the partnership property (Code, § 2904); but, when the action is against the partners individually, though they are described as partners composing the firm, execution is properly issued against them individually. *Ib.* 278.
3. *Partnership inter sese; when created.*—When the rights of third persons, who have dealt with parties associated in business, are concerned, a partnership may arise by mere operation of law, being implied from a community of profit and loss, even in opposition to the expressed intention of the parties themselves; but, as between the parties themselves, the question whether a partnership exists is one of intention; and when their agreement has been reduced to writing, the intention must be collected from the words of the instrument, construed in the light of the circumstances surrounding the parties when they entered into it, the occasion which gave rise to it, and the objects to be accomplished by it.—*Couch v. Woodruff*, 466.
4. *Same.*—A written agreement, signed by C., H., and E., which recites that C. "is desirous of enlarging and extending his present commission business, and desires to engage the services of H. and E.," and that the parties "therefore enter into the following agreement;" and which then provides—1st, "that C. is to invest a capital of \$10,000 in the business," which is to be conducted at Selma, in the name of C. & Co., "and is to be allowed eight *per cent.* interest on all funds he invests in said business;" 2d, that he "is to employ the services of E., at a salary of \$1,500 *per annum*, and all other help needed in said business;" 3d, that "for the influence and business qualifications of H., said C. agrees to give him the half of the net profits of said business, after all expenses are paid;" 4th, that C. is not to draw out any part of the \$10,000 invested by him in the business, until the day specified for its termination, "at which time he is to pay said H. his half of the net profits of said business, if any;" 5th, that each of the three parties agrees to give his whole time and attention to the business, H. further agreeing to pay half of

PARTNERSHIP—*Continued.*

- all the losses the business may sustain, if any,—creates a partnership between C. and H., as between themselves.—*Ib.* 466.
5. *Stating account on settlement of partnership.*—When the articles of partnership bind each partner to devote his whole time and attention to the common business, and, on settlement of the partnership accounts in equity, one of the partners is charged with a sum of money which he agreed to pay for the privilege of undertaking an agency for a third person outside of the partnership business, the amount so charged should be credited to the partnership, and not to the other partner individually.—*Ib.* 466.
 6. *Stock in private corporation, held by partnership.*—On the dissolution of a partnership owning stock in an incorporated savings-bank, the retiring partner selling out his interest to the others, and the latter assuming all the debts of the partnership, and continuing the business under a new name; the new firm, as the successor of the old, becomes the equitable owner of the stock; and the bank's lien on the stock covers the liabilities of the new firm, in its subsequent transactions with the bank, and must prevail over the claim of an equitable assignee of the retiring partner.—*Ib.* 466.

PARTY-WALL.

1. *Contribution between adjacent proprietors.*—When a party-wall separating the buildings of adjacent proprietors, and erected by them at their joint expense, is destroyed by fire, there is no implied agreement between them, nor is there any legal obligation, to rebuild another wall in like manner on the same foundation; and if one rebuilds on the same foundation, he can not compel a purchaser from the other proprietor to contribute to the cost of the wall, or to make compensation for using it in the subsequent erection of a building on the other lot.—*Antonarchi v. Russell*, 356.
2. *Same; custom, or usage.*—"The custom and practice of lot-owners in the city of Mobile," as to contribution or compensation between the owners of adjacent lots for the cost of a party-wall between them, can not be received to affect their legal rights; and if such custom or usage were valid, it is not sufficiently pleaded by an averment that it has been "constantly and uniformly recognized and abided by in said city in similar cases."—*Ib.* 356.

PAYMENT. See EXECUTORS AND ADMINISTRATORS, 1-8.

PLEADING AND PRACTICE AT LAW.

1. *Party; who may sue on replevin bond.*—When a replevin bond is made payable to the officer by whom the writ is levied, instead of the plaintiff in attachment (Code, § 3289), the plaintiff can not maintain an action on it in his own name.—*Agnew v. Leath*, 345.
2. *Demurrer to part of breach.*—In an action on a penal bond, assigning breaches, and specifying the damages which the plaintiff claims by reason of the breach, a demurrer "to that portion of the complaint which claims damages" which are not recoverable, is well taken.—*Copeland & Brantley v. Cunningham*, 394.
3. *Plea of composition with creditors, by bankrupt.*—When a composition with his creditors is pleaded by the bankrupt, in bar of a subsequent action by a creditor, the plea must aver that the plaintiff's name, &c., were included in the defendant's statement.—*Shulman, Goetter & Weil v. Graves*, 402.
4. *Plea in abatement, for insufficient averment of name of third person.*—It is not good matter for a plea in abatement, that, in stating the name of a third person in an indictment, the initial letter of his Christian name is used, instead of the name itself.—*Huley v. The State*, 83.
5. *Misnomer; plea in abatement as to.*—The defendant being indicted by the

PLEADING AND PRACTICE AT LAW—*Continued.*

name of "*Zack, alias Zachariah*," and pleading in abatement that his true name was *Zacary*; and the evidence showing that, while his true name was *Zacary*, he was generally known and called by the name of *Zack*, which some of the witnesses supposed was an abbreviation of his true name; held, that the court did not err in instructing the jury, "if they believed from the evidence that he was generally and as well known by the name of *Zack* as any other," they must find the issue against the defendant; nor in refusing to charge, at the instance of the defendant, "that if he was called and known by the name of *Zack*, as an abbreviation, or initial of his proper name, and that his proper name was *Zacary*, and not *Zachariah*, or *Zack*," they must find the issue for the defendant.—*Ib.* 83.

6. *Same*; *waiver of*.—A plea in abatement, regularly filed, on account of a misnomer, is waived by the subsequent interposition of a demurrer, or other pleading, which, in effect, admits that the defendant is the person charged; and when so waived, this court will not inquire into the correctness of the rulings of the court below on the plea, since they could be, at most, only error without injury.—*Haley v. The State*, 89.

PROHIBITION.

1. *When prohibition lies*.—A writ of prohibition lies, not for the correction of errors in the exercise of a rightful jurisdiction by a court, but to prevent usurpation, or the exercise of powers beyond and outside of its lawful jurisdiction; and it is only awarded when there is no other appropriate and adequate remedy.—*Ex parte Mobile & Ohio Railroad Co.*, 349.
2. *Same*.—When the removal of a cause into the Federal court is sought, and is improperly refused by the State court in which the cause is pending, the party has an adequate remedy under the act of Congress of March 3, 1875, and is not entitled to a writ of prohibition, or other extraordinary writ from this court.—*Ib.* 349.
3. *When writ lies to chancellor*.—The times and places of holding the several Chancery Courts, and the duration of the terms of the court, being prescribed by law, the chancellor can not hold court at any other time or place, nor exercise any judicial functions in vacation, except as specially authorized by statute, or by the rules of practice prescribed by this court under the power vested in it by law; and any improper exercise, or attempted exercise by him, of such judicial functions in vacation, would be controlled by prohibition issued from this court.—*Ex parte Branch & Co.*, 383.

RAILROADS.

1. *Liability as common carrier, for loss of goods*.—As to the liability of a common carrier who receives goods consigned to a point beyond the terminus of his own line or route, and does not by express agreement limit his liability to losses or injuries over his own line, there is a conflict of judicial decisions; but this court adopts the rule laid down in the leading English case, *Muschamp v. L. & P. Railway Co.* (8 Mees. & W. 421), and holds the carrier liable for the non-delivery of the goods at the designated place.—*M. & G. Railroad Co. v. Copeland*, 219.
2. *Liability for negligence*.—To render a railroad company liable for damages, on account of personal injuries caused by its failure and neglect to keep in repair a bridge across a public highway, it is not necessary to show that the company had knowledge of the defect in the bridge: it is its duty to exercise watchful diligence in keeping the bridge in repair, and it is chargeable with knowledge of every defect which such diligence would have discovered.—*S. & N. Ala. Railroad Co. v. McLendon*, 266.
3. *Exemplary damages*.—In an action against a railroad company, to recover damages for personal injuries caused by the failure and neglect to keep in proper repair a bridge over a public highway, the plaintiff may

RAILROADS—*Continued.*

recover exemplary or punitive damages, if the negligence was gross ; and the degree of negligence is a question for the determination of the jury, under proper instructions from the court.—*Ib.* 266.

REMOVAL OF CAUSES.

1. *Removal of cause into Federal court.*—When application is made for the removal of a cause from a State court into a Federal court, under the acts of Congress regulating the removal of causes, the jurisdiction of the former court does not cease on the filing of a petition and bond in proper form : the court must examine the petition, in connection with the cause to which it relates, and determine for itself whether a sufficient cause of removal is shown ; and until it determines that sufficient cause is shown, its jurisdiction over the cause is not terminated.—*Ex parte Mobile & Ohio Railroad Co.*, 349.
2. *Same ; remedy when refused.*—When the removal of a cause into the Federal court is sought, and is improperly refused by the State court in which the cause is pending, the party has an adequate remedy under the act of Congress of March 3, 1875, and is not entitled to a writ of prohibition, or other extraordinary writ from this court.—*Ib.* 349.

RETAINER. See EXECUTORS AND ADMINISTRATORS.

SCIRE FACIAS. See CRIMINAL LAW, 15-20.

SHERIFF. See CRIMINAL LAW, 13, 14 ; EXECUTION.

SLANDER. See CRIMINAL LAW, 36-40.

SUPERSEDEAS. See BONDS, 6, 7.

SURETIES.

1. *Contract of suretyship ; good faith required.*—The contract of a surety imports entire good faith between him and the creditor, which must be kept inviolate in all subsequent dealings between the creditor and the principal debtor ; but the term is relative, and in determining whether it has been exercised the particular facts of each case must be considered.—*White's Adm'r v. Life Association*, 419.
2. *What will discharge surety.*—As a general rule, if the creditor does any act injurious to the surety, or inconsistent with his rights, or omits, when required by the surety, to do any act which duty enjoins on him, and the surety is thereby injured ; in all such cases, the surety is discharged.—*Ib.* 419.
3. *Same.*—Any alteration in the terms of the contract, without the assent of the surety, such as an extension of the day of payment, though but for a single day, discharges the surety. But gratuitous indulgence on the part of the creditor, or mere passiveness or delay in enforcing his legal rights against the principal, when the duty of active diligence is not devolved on him by the demand of the surety, does not affect the liability of the latter.—*Ib.* 419.
4. *Same.*—The surety is entitled to the benefit of all securities which the creditor may hold or acquire against the principal for the payment of the debt, and the creditor is bound to exercise reasonable diligence in the preservation and prosecution of such securities ; and if they are lost by his negligence, the surety is, to that extent, discharged.—*Ib.* 419.
5. *Same.*—If the principal tenders payment of the debt in full, after its maturity, and the creditor declines to accept it, the surety is thereby discharged, though he may not have been injured ; but the non-acceptance of an offer of payment by the principal, not amounting to a formal ten-

SURETIES—*Continued.*

- der, is mere gratuitous indulgence, and does not affect the liability of the surety, unless he was thereby injured or prejudiced,—as where the principal was insolvent at the time of the offer.—*Ib.* 419.
6. *Same.*—If the creditor has in his hands moneys of the principal which he may rightfully retain, and voluntarily surrenders them to the principal, whom he knows to be insolvent, he is guilty of bad faith to the surety, and the latter is discharged to the extent of such moneys.—*Ib.* 419.
 7. *Same.*—Where a life-insurance company, holding the note of a deceased policy-holder, for money loaned, and knowing that his estate was insolvent, paid the money due on the policy to his personal representative, to whom it was payable by the terms of the policy, although the latter offered to deduct the amount due on the note, or to receive the note in part payment; *held*, that the surety on the note was thereby discharged.—*Ib.* 419.

TAXATION, AND TAXES.

1. *Municipal ordinance, as to title and rights of purchaser at tax-sale.*—An ordinance of a municipal corporation, which makes it the duty of the tax collector to put the purchaser in possession of lands sold for taxes, and authorizes the mayor, “if necessary,” to direct the police to put him in possession; and which also declares that the certificate given to the purchaser “shall be evidence of a right to possess the premises therein specified, and to retain them until redeemed as provided by the charter, and, if the property is not redeemed within the time prescribed by the charter, shall operate as a deed of conveyance,”—is violative of the constitutional provision, contained in the 7th section of the 1st article, which declares that no person shall be deprived of his property “but by due process of law.”—*Calhoun v. Fletcher*, 574.
2. *Garnishment of debt due for taxes.*—On grounds of public policy, a judgment creditor of a municipal corporation can not, by process of garnishment, reach and subject funds accruing to it by taxation, either while in the course of collection by suit, or after they have been paid into its treasury. (Overruling *Smoot v. Hart*, 33 Ala. 69.)—*Underhill v. Calhoun*, 216.

TAX-COLLECTOR. See BONDS, 8.

TRESPASS.

1. *When heir may maintain action for trespass on lands.*—The heir may maintain an action at law for a trespass on lands descended to him, although the administrator had, prior to the commission of the trespass, obtained an order to sell them for the payment of debts, but had never sold them under the order, nor otherwise exercised any of his statutory powers over them, and had resigned his administration before the commencement of the action.—*Calhoun v. Fletcher*, 574.
2. *Plea of not guilty; what evidence admissible under.*—On the former appeal in this case (51 Ala. 504), it was rightly ruled, that in an action of trespass *de bonis asportatis*, under the plea of not guilty, the defendant can not be allowed to prove, in mitigation of damages, or for any other purpose, that the act complained of was done under legal process.—*Womack v. Bird*, 500.
3. *Justification under legal process; what constitutes.*—When the defendant, in such action, pleads justification under mesne process (as the levy of an attachment), after the return day of the writ, he must aver and show the due return of the process, or a sufficient excuse for the failure to return it.—*Ib.* 500.
4. *Same; what will excuse the failure to return process.*—A compromise of the attachment suit between the parties thereto, made after the levy, by which a portion of the property seized was delivered to the plaintiff.

TRESPASS—*Continued.*

therein, and the residue restored to the defendant, or left for him where it then was, nothing being said as to the disposition of the suit, is not a sufficient excuse for the failure to return the attachment.—*Ib.* 500.

5. *Compromise of attachment suit; how available in defense of trespass for levy.* Such compromise of the attachment suit, and its performance, are not a bar to the action of trespass on account of the levy; though the partial restitution of the property, under the compromise, is good matter in mitigation of damages, under the plea of not guilty.—*Ib.* 500.

TROVER.

1. *When trover lies.*—To maintain the action of trover, the plaintiff must have the legal title, general or special, to the chattel sued for, and the right to its immediate possession. A partial or equitable interest, a lien not created by a conveyance of the legal title, or by delivery of possession, or a right to a part of an unsevered bulk, will not support the action.—*Tucker v. Henderson's Adm'r*, 280.
2. *Same.*—The act "to regulate property exempt from sale for the payment of debts," approved April 23, 1873 (Sess. Acts 1872-3, p. 64), exempted from liability for the debts of the deceased husband, in favor of his surviving widow, "personal property to the value of one thousand dollars" belonging to his estate; and this right accrued to the widow on the death of the husband, although she only survived him a few days. But the statute did not vest in her the title to any specific property, as so exempt: until a selection was made by her, the personal representative, or commissioners appointed by the judge of probate, she had no title to any specific property, for which she could maintain trover against the husband's administrator; nor could her personal representative maintain such action.—*Ib.* 280.
3. *When trover lies for conversion of bond.*—The owner of a non-negotiable bond may maintain an action for its conversion against a person who obtained it through an unauthorized transfer by his agent or bailee, and who refuses to deliver it on demand.—*Blackman v. Lehman, Durr & Co.*, 548.

TRUSTS AND TRUSTEES.

1. *Continuance of trustee's title.*—Under a deed executed in 1846, by which the grantor, declaring his desire to make "a sure and permanent provision" for his wife, conveys lands and slaves to a trustee, "his heirs and assigns," in trust for the sole use and benefit of the wife during the term of her natural life; and, at the termination of said estate, "then the said lands and premises, and the said slaves and their future increase, to be held in trust by the said L." [trustee] "for the sole use and benefit of" her children by the grantor; the estate of the trustee terminates on the death of the wife, and the legal title then passes to the children who are remainder-men; and on the subsequent marriage of one of the daughters, her interest in the property is held by her as a part of her statutory separate estate.—*Bercy v. Lavretta*, 374.

VENDOR AND PURCHASER.

1. *Right of stoppage in transitu.*—The seller of goods may stop them *in transitu*, on account of the insolvency of the purchaser, not only when such insolvency occurred after the sale, but also when, though existing before, it was not discovered until after the sale.—*Loeb & Brother v. Peters & Brother*, 243.
2. *Same; when lost.*—The right of stoppage by the seller is lost, when, before it is exercised, the purchaser has sold the goods, and indorsed the bill of lading, to a sub-purchaser for value in good faith.—*Ib.* 243.
3. *Same; evidence of want of good faith by sub-purchaser.*—That the sub-purchaser, when he took a transfer of the bill of lading for the goods, had knowledge of the original purchaser's insolvency, is a fact tending

VENDOR LED PURCHASER—*Continued.*

- to show that he did not purchase in good faith, and is admissible for that purpose in a contest with the original vendor.—*Ib.* 243.
4. *Who is purchaser for valuable consideration.*—The transfer of the bill of lading by the purchaser of the goods, as collateral security for a pre-existing debt, without any new consideration, does not constitute the assignee a purchaser for valuable consideration.—*Ib.* 243.
 5. *Vendor's lien; transfer of note for purchase-money.*—A vendor's equitable lien on land, for the unpaid purchase-money, does not pass to an assignee or transferee of the note given for the purchase-money, when the transfer does not involve the vendor in liability for the ultimate payment of the note, but secures to him all the benefits of a payment.—*Barnett v. Riser's Executor*, 347.
 6. *Same; what objections avail on error.*—A decree enforcing a vendor's equitable lien on land, in favor of an assignee or transferee of the notes for the purchase-money, will not be reversed on error, because the record does not affirmatively show that the lien passed to him by the transfer of the note, when that question was not raised in the court below.—*Ib.* 347.
 7. *Vendor's lien; against whom asserted.*—A vendor's lien on land, for the unpaid purchase-money, can not be asserted against a *bona fide* purchaser for valuable consideration without notice.—*Thurman v. Stoddard & Co.*, 336.
 8. *When mortgagee is bona fide purchaser for value.*—When a mortgage is given simply as security for a pre-existing debt, the time of payment not being extended, nor any new consideration intervening, the mortgagee is not entitled to protection, as a *bona fide* purchaser for valuable consideration, against an equitable title or claim of which he had no notice; *secus*, when the day of payment is extended in consideration of the mortgage.—*Cook v. Parham & Bunt*, 456; *Thurman v. Stoddard*, 336.
 9. *Who is purchaser for valuable consideration.*—To establish the defense of a *bona fide* purchase for valuable consideration without notice, good faith and a valuable consideration (that is, money paid, a liability assumed, or an injury incurred) must concur: extending the day of payment of an antecedent debt, or taking a mortgage to secure a debt presently contracted, or an absolute purchase of property in payment of an antecedent debt, is a valuable consideration; but a mortgage to secure an antecedent debt, without any extension of the day of payment, is not.—*Thames & Co. v. Rembert's Adm'r*, 561.
 10. *Examination of title-deeds by purchaser; when chargeable with notice.*—A purchaser of lands has the right, and it is his duty, to examine every instrument which forms a link in the chain of his vendor's title; and he is chargeable with notice of every fact recited in any of those instruments, or appearing on their face; hence, when a deed is, on its face, fraudulent and void as against the grantor's creditors, a sub-purchaser from the grantee can not, as against those creditors, claim protection as a *bona fide* purchaser without notice.—*Ib.* 561.
 11. *Title of purchaser from fraudulent grantee.*—A purchaser from a fraudulent grantee may, as against the creditors of the grantor, set up the defense of a *bona fide* purchase for valuable consideration without notice, when the deed is not fraudulent and void on its face.—*Ib.* 561.

VENUE. See CRIMINAL LAW, 61.

VERDICT.

1. *Sufficiency of verdict.*—In an action against husband and wife, seeking to charge the wife's property, particularly described, and alleged to belong to her statutory separate estate, with the price of necessary family supplies sold and delivered (Code, § 2711), a verdict finding the issue in favor of the plaintiffs, assessing their damages at a specified sum, and further finding "the following *separate estate* to belong to" the wife, is sufficient to support a judgment for plaintiffs, although it does not, in

VERDICT—*Continued.*

words, find that the property belongs to the *statutory* separate estate of the wife.—*Nelms v. Armstrong*, 330.

See, also, CRIMINAL LAW, 176, 177.

WILLS.

1. *Application for probate of will; nature of proceeding.*—An application for the probate of a will, in the Probate Court, is a proceeding *in rem*, the purpose of which is to establish the *status* of the estate; and it does not assume the form or character of a suit *inter partes*, until the heirs or distributees intervene as parties.—*Kumpe and Wife v. Coons*, 448.
2. *Contest of probate of will in equity.*—If the application for probate is not contested in the Probate Court, but the heirs or distributees afterwards seek to set aside the probate by bill in equity (Code, § 2336), which is a statutory substitute for probate in solemn form, the character of the proceeding is not changed so far as the estate is concerned, though it is an adversary suit between the parties claiming under and against the will.—*Ib.* 448.
3. *Competency of legatee or devisee as attesting witness to will.*—Under the Code of 1867 (§ 2704), and under the present Code (§ 3058), a legatee or devisee may be an attesting witness to the will, and may testify to its execution in any suit or proceeding in which it may be involved.—*Ib.* 448.

WITNESS.

1. *Competency of child as witness.*—The admissibility of children as witnesses depends, not merely upon their possessing a competent degree of understanding, but also, in part, upon their having received such a degree of religious instruction as not to be ignorant of the nature of an oath, or of the consequences of falsehood.—*Carter v. The State*, 52.
2. *Same; preliminary examination.*—When a child of tender years is produced as a witness in court, it is the duty of the presiding judge to examine him or her, without the interference of counsel further than the judge may choose to allow, in regard to the obligation of the oath taken by a witness; and, in a proper case, to explain the same to one who is intelligent enough to understand what he says; and then to determine whether or not the child shall be sworn and permitted to testify.—*Ib.* 52.
3. *Same.*—*Held*, in this case, that a little negro girl, about nine years old, was improperly permitted to testify as a witness, when the only evidence as to her competency was, that in answer to questions put to her by defendant's counsel, she said, "that she did not know what the Bible was; had never been to church but once, and that was to her mother's funeral; did not know what book it was she laid her hand on when sworn; had heard tell of God, but did not know who it was; and said, if she swore to a lie, she would be put in jail, but did not know she would be punished in any other way."—*Ib.* 52.
4. *Competency of devisees and legatees as attesting witnesses to will, under act of 1806, and Code of 1852.*—The act of 1806, relating to the attestation of wills, and devises or bequests to subscribing witnesses thereto (Clay's Digest, 596, §§ 1-8), was a substantial re-enactment of the English statutes (29 Car. 2, and 25 Geo. 2); and the latter statute, declaring a legatee or devisee competent as an attesting witness, but avoiding his legacy or devise, was carried into the Code of 1852 (§ 1608).—*Kumpe v. Coons*, 448.
5. *Same; under act of February 14, 1867, and Revised Code.*—This section of the Code of 1852 (§ 1608) was expressly repealed by the act approved February 14, 1867 (Sess. Acts 1866-7, p. 455), and was therefore omitted from the Revised Code of 1867. But this repeal and omission did not revive the common-law rule as to the competency of legatees and devisees as attesting witnesses to wills: it was the effect and result of the

WITNESS—*Continued.*

- general statute, of which the repealing section was a part, and which was intended as a revision of the whole subject of the competency of witnesses as affected by interest or connection with the suit or proceeding.—*Ib.* 448.
6. *Competency of witnesses as affected by interest; exception as to suits by or against executors or administrators.*—The great purpose of the said act of February 14, 1867 (Rev. Code, § 2704), was to enlarge the competency of witnesses, by removing interest or connection with the cause as a disqualification; and the only exception or exclusion made by the statute was as to transactions with, or statements by any deceased person, whose estate was interested in the result of the suit; the reason of the exclusion being, that there should not be admissibility, where there can not be mutuality. The present statute (Code, § 3058) is a continuation of the same policy.—*Ib.* 448.
 7. *Same; competency of legatee or devisee as attesting witness to will.*—Under the Code of 1867 (§ 2704), and under the present Code (§ 3058), a legatee or devisee may be an attesting witness to the will, and may testify to its execution in any suit or proceeding in which it may be involved. *Ib.* 448.
 8. *Preliminary questions to witness, as to age, occupation, &c.*—It is a common practice, where a witness is put on the stand, to ask him his age, residence, condition in life, etc.; which questions are merely introductory, intended to aid the jury in putting a proper estimate on his testimony, and hardly the subject of exception. Under this practice, the prosecutrix in a criminal case may be asked, "if she was a widow."—*Cooper v. The State*, 80.
 9. *Refreshing memory of witness by memorandum.*—A witness may refresh his memory by examining a memorandum made by himself, or known and recognized by him as stating the facts truly, when, after such examination, he can testify to the facts as matter of independent recollection; but, in such cases, the memorandum itself is not thereby made evidence in the cause, unless the opposing party calls for it.—*Acklen's Executor v. Hickman*, 494.
 10. *Same.*—If the memory of the witness is not refreshed by an examination of the memorandum, so that he can testify to the facts as matter of independent recollection, but he can nevertheless testify that, at or about the time the memorandum was made, he knew its contents, and knew them to be true, his testimony and the memorandum are both legal and competent evidence; but, if he did not know the contents of the memorandum to be true when it was made, although he saw it made, and he has no independent recollection of the facts after examining it, the memorandum is not admissible evidence of the facts therein stated. *Ib.* 494.
 11. *Same.*—A witness, testifying to the correctness of an account, may aid his memory by consulting the entries in books, when he himself made them, and had knowledge of their correctness when he made them; but he can not testify to the correctness of an account, as made out from books in his custody and possession, when he did not himself make the entries, and has no knowledge of the matters of account, except as derived from the books.—*M. & C. Railroad Co. v. Muples*, 601.
 12. *Impeaching witness by proof of former declarations.*—A witness can not be examined as to his former declarations, about a matter that is collateral and irrelevant, for the purpose of laying a predicate to impeach him; and when the matter inquired about is relevant, he can not be required to give a categorical answer, but has the right to explain what he said on the specified occasion.—*Washington v. The State*, 189.
 13. *Discredited witness; weight of testimony of.*—There is no maxim of the law of evidence which requires greater caution in its application, than that which affirms that a witness, intentionally giving false testimony as to any material fact, is to be wholly discredited by the jury; and this

WITNESS-- Continued.

court "follows the authorities which hold that it is not a rule of law, affecting the competency, operating a disqualification of the witness, to be given in charge to the jury as imperatively binding them, but is to be applied by them, according to their sound judgment, for the ascertainment, and not for the exclusion of truth."—*Grimes v. The State*, 166.

14. *Statements of party as witness in another suit.*—Statements made by a witness while testifying, relative to a material matter in issue in another suit to which he is a party, as showing his knowledge of the insolvency of another person, may be proved against him in that suit without calling him as a witness.—*Loeb & Bro. v. Peters & Bro.*, 243.
15. *To what plaintiff, as witness, may testify.*—The plaintiff, testifying as a witness to her personal injuries, may state, "In consequence of loss of time, and physical disability from the injuries, she had been prevented from earning money by her labor, and had been injured fifty dollars within the four months next after the fall, in consequence of the hurts caused by the fall." This, in substance, is an assertion that her labor during that time would have been worth fifty dollars.—*S. & N. Railroad Co. v. McLendon*, 266.
16. *To what witness may testify.*—The following expressions, used by a witness testifying as to the personal injuries received by the plaintiff, "though awkwardly expressed sometimes, are, at most, conclusions of fact," and are not improperly allowed: "Plaintiff seemed to be suffering" the day after the injury; "she was not able to return home" on that day; "was not able to use her arm a large part of the time for several months;" "when she returned home," on the second day after the injury, "she looked bad, and her left wrist looked like the bone had slipped off the joint;" "she was disabled by the fall, &c.—*Ib.* 266.
17. *Same.*—In a prosecution for murder, whether the defendant, at the time of the homicide, was so drunk as to be incapable of forming a design or intent, is a conclusion to be drawn by the jury from all the evidence before them, and not a question of fact to which a witness may testify.—*Armor v. The State*, 173.
18. *Same.*—Intemperate habits is a collective fact, to which a witness may testify, if he has sufficient knowledge; and the person to whom the liquor was sold may himself testify whether he is or is not of intemperate habits.—*Tatum v. The State*, 147.
19. *Same.*—A person, knowing the fact, may testify that the intemperate habits of the person to whom the liquor was sold were generally known in the neighborhood in which the sale was made.—*Ib.* 147.
20. *Meaning and explanation of words used.*—In a criminal prosecution for slander of a female (Code, § 4107), when the words used are unambiguous, and of ordinary acceptance and signification, the court and jury must construe them; but, when some cant phrase, or low expression, not having an ordinary acceptance, is used, a witness may testify as to its meaning.—*Haley v. The State*, 89.
21. *Declarations of witness out of court; when and how proved.*—The declarations of a witness who has been examined, as to any material matter about which he was not questioned, can not be proved by another witness. The witness himself must be first interrogated as to such declarations.—*Atwell v. The State*, 61.
22. *Impeaching and sustaining witness.*—When a witness is interrogated, on cross-examination, as to former inconsistent declarations, and denies that he made them, he may state, in rebuttal, what he did say on the particular occasion specified.—*Haley v. The State*, 83.
23. *Same.*—When a witness has been impeached by proof of former declarations inconsistent with his testimony, his credibility may be sustained by proof of his general good character.—*Ib.* 83.
24. *Same.*—It is permissible to prove a previous dispute between the accused and a witness for the prosecution, as tending to show the existence of unfriendly relations between them: but, when the subject of the dispute has no connection with the offense for which the accused is on

WITNESS—*Continued.*

trial, the witness can not be impeached by the contradictory testimony of others.—*Ib.* 83.

25. *Proof of character; competency of witness.*—A witness, who states that "he knows the general character of the defendant from rumor," is not competent to testify in reference to it.—*Ib.* 83,

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